No. 3919

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. P. BUTCHART and CLARK M. MOORE,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiffs in Error

TEAL, WINFREE, JOHNSON & McCULLOCH
A. B. WINFREE,
1016 Spalding Building, Portland, Ore.
Attorneys for Plaintiffs in Error.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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Upon Writ of Error to the District Court of the United States for the District of Oregon.

STATEMENT OF THE CASE

The defendants (plaintiffs in error here) together with officers of certain California and Washington cement companies, were indicted in two counts involving alleged violations of what is commonly called "The Sherman Anti-Trust Act," an Act of Congress approved July 2, 1890. Count One alleges that during ten years last past cement was manufactured at divers places in the State of California and west of the Cascade Mountain range in the States of Washington and Oregon, and was a useful and necessary article of commerce; that said companies sold large portions of cement manufactured by them to consumers of, and dealers in such cement, whose several places of consumption and busi-

ness have been situated in others of said States than the one where said cement was so manufactured.

That since the first day of August, 1914, the various individuals named in the indictment were officers and agents of said companies; that plaintiffs in error, R. P. Butchart and Clark M. Moore, were respectively president and sales manager of the Oregon Portland Cement Company; that from the first day of August, 1914, to the finding and presentation of the indictment, defendants unlawfully and knowingly engaged in a combination in undue, unreasonable, direct and oppressive restraint of interstate trade and commerce thereinafter set forth as follows:

> "Said defendants so being in the active management, direction, and control of the business and affairs of said concerns as aforesaid, in their said several capacities as officers and agents of those concerns throughout said last mentioned period of time, unlawfully and knowingly have by concerted action carried on and conducted said business of said concern without any competition as to the localities in said States of Washington, Oregon and California, in which they respectively sold said cement, except as to said portion of said State of Oregon west of said Cascade Mountain range, to the extent hereinafter indicated, and without any competition as to the prices at which they would respectively sell such cement in said State of Oregon west of said Cascade Mountain Range as hereinafter specified, and unlawfully and knowingly have by concerted action prevented said Southern California company from

selling or consigning for sale its cement either in Washington or Oregon; said Northern California company from selling or consigning for sale their cement in Washington; said Washington companies from selling or consigning for sale their cement either in Oregon or California; and said Oregon company from selling or consignment for sale its cement either in Washington or California; and unlawfully and knowingly have by concerted action prevented said Northern California companies and said Oregon company from selling or consigning for sale their cement in Oregon, otherwise than upon arbitrary and non-competitive prices fixed and agreed upon between them in advance of such sales, and consignments for sale; and in consequence of said unlawful conduct on the part of said defendants, and because of the want of competition in the particulars aforesaid between said concerns, all consumers of such cement in said localities in said States of Oregon, Washington and California have been deprived of the benefits of competition as to the particulars aforesaid between said concerns so manufacturing and furnishing the same as aforesaid, and have been compelled to pay for such cement arbitrary prices, and prices greatly in excess of the prices at which they would have secured such cement if said defendants had not engaged in said unlawful combination in restraint of such trade and commerce as aforesaid."

That defendants (naming them), during the period of time from the first day of August, 1914, to the day

of the finding and presentation of the indictment, in said District of Oregon, and within the jurisdiction of said District Court of Oregon, in manner and form and by means and methods aforesaid, unlawfully and knowingly have engaged in a combination in restraint of trade and commerce among the several States.

Count Two reiterates the allegations of Count One and alleges that said defendants

> "Unlawfully have, in the District of Oregon, and within the jurisdiction of this Court, monopolized said trade and commerce, it being a part of the trade and commerce among the several States."

To such indictment defendants R. P. Butchart and Clark M. Moore filed their demurrer to Count One, on the following grounds, viz.:

First. The matters and things set forth and charged in said Count One do not constitute an offense under or against the laws or any law of the United States.

Second. That the averments of said Count One were too general, vague, indefinite and uncertain, to inform said defendants or either of them of the nature or cause of the accusations against them or either of them, or to appraise them or either of them with such reasonable certainty of the offense or offenses with which they or either of them were charged, or which they or either of them may expect to meet on the trial, as to enable them or either of them to make their defense.

Third. That said Count One did not contain a description of, or set forth or show, any combination in restraint of trade and commerce.

And said defendants also demurred to Count Two of said indictment and specified the following as grounds for said demurrer:

First. The matters and things set forth and charged in said Count Two do not constitute an offense under or against the laws or any law of the United States.

Second. That the averments of said Count Two were too general, vague, indefinite and uncertain to inform said defendants or either of them of the nature or cause of the accusations against them or either of them, or to appraise them or either of them with such reasonable certainty of the offense or offenses with which they or either of them were charged, or which they or either of them may expect to meet on the trial, as to enable them or either of them to make their defense.

Third. That said Count Two did not contain a description of, or set forth, or show, any combination to monopolize the trade and commerce, or any part of the trade and commerce among the several States of the United States.

Fourth. That the said Count Two did not state facts sufficient to charge or show that the said defendants, or either of them, have monopolized the trade or commerce or any part of the trade and commerce among the several States of the United States.

This demurrer was presented on brief and oral argument and thereafter the trial court entered an order overruling such demurrer. Thereafter the case came on upon trial and trial being had the jury returned a verdict finding defendant R. P. Butchart guilty as charged in

Count One of the indictment, and guilty as charged in Count Two of the indictment, and found Clark M. Moore guilty as charged in Count One of the indictment, and guilty as charged in Count Two of the indictment. A motion for new trial was filed, which was overruled by the Court, and the Court thereupon imposed a fine upon R. P. Butchart of Five Thousand Dollars ($5,000), and upon said defendant Clark M. Moore in the sum of Two Thousand, Five Hundred Dollars ($2,500).

From the judgment entered thereon the defendants, R. P. Butchart and Clark M. Moore, have prosecuted this writ urging as the principal grounds for reversal the overruling of the demurrer of these defendants to the indictment; the errors of the Court in admitting evidence which was incompetent, irrelevant and immaterial by reason of the fact that such evidence so admitted over the objection of these defendants related to matters of intrastate commerce solely, to matters which were entirely lawful and proper for these defendants and the other defendants interested or accused of violation of the law to do and perform, and to matters and things occurring prior to the organization of the Oregon Portland Cement Company, or these defendants becoming officers of said corporation, or the conduct of these defendants as officers of said corporation after the same was organized and started the manufacture and sale of cement, and which matters and things were not in any way connected with the conduct of these defendants subsequent to their becoming officers of said Oregon Portland Cement Company, and also to admission in evidence of statements made by persons to the Department

of Justice, which were prejudicial to these defendants not under oath and could have no bearing upon the trial of these defendants; also to the ruling of the Court excluding certain evidence offered by defendants, which qualified or explained the action of defendants in connection with the Oregon Portland Cement Company, and tended to qualify and explain the evidence improperly admitted by the Court; and the error committed by the trial court in its charge to the jury, or in other words, in stating the law to the jury for its guidance, and the refusal of the trial court to give certain instructions requested by these defendants. All of which points are more particularly stated in the specification of errors relied upon.

SPECIFICATION OF ERRORS

I.

The Court erred in overruling the demurrer of these defendants to the indictment found by the grand jury in the above entitled cause.

II.

The Court erred in overruling the objections of these defendants to the introduction of any evidence in this cause upon the ground that the indictment does not state facts sufficient to charge a crime of any kind or any violation of the law, which objection was made in open Court before any evidence was admitted in said cause.

III.

The Court erred in overruling the objection of these defendants to a letter from Jones to Henshaw dated

March 9, 1915, and in admitting said letter in evidence and to be read to the jury. This letter is marked "Plaintiff's Exhibit 33" and the full substance thereof is with reference to freight reduction on Interstate Bridge contract.

IV.

The Court erred in overruling the objection of these defendants to any evidence regarding the Interstate Bridge between Portland and Vancouver, and particularly the evidence of witness C. F. Swigert in regard to buying cement from International Portland Cement Company for $1.65 per barrel delivered at Portland on condition that the freight rate on such cement from Spokane to Portland should be 13½c per 100 lbs., and all evidence of every kind in regard to cement furnished for said Interstate Bridge or in regard to the negotiations between the witness Swigert and the cement companies other than the Oregon Portland Cement Company for the purchase of said cement for said purpose; and in admitting any evidence in regard to said matters and in regard to the proposed freight rate on cement from Spokane to Portland. The substance of said evidence is that the witness purchased cement for this purpose from the International Portland Cement Company of Spokane at $1.65 per barrel delivered in Portland; that he had quotations from other cement companies ranging from $1.90 to $1.75; that the price in Spokane at that time ran from $1.08 to $1.15 as there was a bitter fight between the International Portland Cement Company and the Lehigh Portland Cement Company; that the witness went to the Spokane, Portland & Seattle

Railway Company's officials and they agreed to put in this rate of 13½c per hundred from Spokane to Portland on cement; that he also lined up about 60,000 barrels of cement all subject to this rate going into effect; that he saw some of the Washington Portland Cement Company people, among others Mr. Coats and that Coats said if he would not insist upon Skinner, the agent of the Spokane, Portland & Seattle Railway Company, putting in this rate he would see that the witness was protected in price; that the cement supplied to him was almost entirely Superior cement, a Washington product, or Santa Cruz cement, a California product, and that he paid for this cement $1.65; that he never got any cement afterwards as cheap; that orders were placed with International Portland Cement Company but the cement was furnished by the Superior or Santa Cruz Cement Companies upon these orders, mostly Santa Cruz cement, and that subsequently the orders were placed directly with the Santa Cruz Cement Company in Portland, or with Mr. Bennett, agent of the Superior Company in Vancouver.

V.

The Court erred in overruling the objection of these defendants to a contract between the Superior Portland Cement Company and the Pacific Bridge Company, and in admitting said contract in evidence and to be read to the jury. Said contract is marked "Plaintiff's Exhibit 38," and in substance is a contract between the Superior Portland Cement Company and the Pacific Bridge Company whereby Superior Portland Cement Company agreed to furnish to Pacific Bridge Company

for building the substructure of the Interstate Bridge between Portland and Vancouver at a price of $1.65 per barrel.

VI.

The Court erred in overruling the objection of these defendants to a letter to the Treasury Department, dated February 2, 1915, marked "Plaintiff's Exhibit 40," and in admitting said letter in evidence and to be read to the jury. Said letter is as follows:

"Treasury Department,
Washington, D. C.

Gentlemen:

We, the undersigned dealers in building materials of this city wish to report to you the predicament we find ourselves in at the present time due to a combination made to control the sale of all cement here and also in the adjoining city of Hoquiam. This combination apparently being entered into by the following well known manufacturers of cement: The Superior Portland Cement Company, The Washington Portland Cement Company, and the Olympic Portland Cement Company of this state with head offices in Seattle; The Pacific Portland Cement Company with offices in San Francisco and also the F. G. Foster Company of Hoquiam, Washington, the latter dealers in building materials.

Now this city has been supplied through the undersigned in the past with Washington and California manufactured cements. The T. B. Darragh Company selling the cement of the Pacific Portland

Cement Company. The Aberdeen Manufacturing Company selling the cement of the Henry Cowell Lime & Cement Company, and the W. R. Lebo Company selling the cements of all three of the mentioned Washington companies.

The first of the year saw the following changes here due to this combination. Cement was raised 30c per barrel to the consumer, from $1.90 to $2.20 net. The agency held by the Lebo Company of the three Washington cements was taken away from them and given to the F. G. Foster Company who then opened up a branch business here with a stock of building materials. The Pacific Portland Cement Company notified the Darragh Company that they must quote cement no cheaper than $2.30 net, or 10c above the Foster Company price, which naturally eliminated the Darragh Company from securing any cement business. The Henry Cowell Lime & Cement Company wrote the Aberdeen Manufacturing Company that they had withdrawn from the Washington market and that they would ship no more cement to Aberdeen. Now this action was taken by the California companies the first of the year in spite of the fact that they could get the business at a 30c per barrel advance in price and a 50c per barrel advance over what they received for cement here during most of the year 1914, the price then being $1.70 net. Also, these same California companies are today shipping cement into Portland, Oregon, at a higher freight cost from San Francisco then the freight cost is to Aberdeen, and receiving for this cement in Portland 30c per bbl. less than they can

get it in Aberdeen, under the present prevailing market price.

This combination is going to work a great hardship upon us for the following reasons: we deal in all kinds of building materials and as most orders in a city the size of Aberdeen are mixed orders, consisting of cement, lime, brick, etc., etc., a buyer in nearly every instance wants his requirements from one place and as cement is usually the chief item, this combination is going to stifle competition and give the Foster Company a leverage that must soon draw the bulk of the building material business to them, to the demoralization and perhaps ruin of our business.

Now this combination must certainly be illegal and we are therefore writing you and requesting that your Department investigate this matter and if possible get relief for us.

Yours very truly,

ABERDEEN MANUFACTURING COMPANY,

.....Mgr.

W. R. LEBO & COMPANY,

.....Mgr.

T. H. DARRAGH,

.....Mgr."

VII.

The Court erred in overruling the objection of these defendants to the following question propounded to witness J. G. Bennett, a witness on behalf of the United States:

Question: "What did he say to you about it?" and in permitting said question to be answered, and in admitting in evidence the answer of said witness. The substance of his testimony is that Mr. Lille, a salesman of the Superior Portland Cement Company, made a trip to Vancouver, Washington, and informed said witness that there was a meeting in San Francisco of the cement manufacturers of the companies including the Washington and California, about the beginning of 1915, and that there would be an adjustment of prices and that prices would be much higher and no deviations from said prices, and advised the witness to buy all the cement he thought he could handle. He bought accordingly at $1.55 and shortly afterward had a wire that the price would be $1.90 and with the usual dealer's commission.

VIII.

The Court erred in overruling the objection of these defendants to a letter written by witness Bennett to J. C. Eden and the reply of Eden to the same upon the back of said letter, and in admitting said letter and answer in evidence and to be read to the jury. The letter and answer are marked "Plaintiff's Exhibit 41," and are as follows:

"Vancouver, Washington, April 30, 1915.

Mr. John C. Eden,
Seattle, Washington.

Dear Sir:

We wrote your firm asking about the situation in regard to the bridge cement. We have answer saying

the rate question had not been settled yet and ending as follows:

'If, however, coast cement should be used, we would in all probability have to put it through our Portland representative, viz., Balfour-Guthrie Company.

(Signed) Superior Portland Cement Company
A. A. Sutherland.'

This does not worry us any as we have been told by both yourself and Mr. Barnes that if Superior cement is used it will be handled by us. However, it looks to us as if your Mr. Sutherland was trying to lose your remaining Vancouver customer.

Very likely it is a California proposition by this time anyway, as the writer saw a schooner unloading cement at the Pacific Bridge Company dock yesterday, but if there is anything doing for us we would like to know about it and not be kept in the dark.

Very truly yours,
BENNETT HDW. CO.,
J. G. Bennett."

"May 5, 1915.

My Dear Bennett:

I have yours of the 30th in regard to cement for the Interstate Bridge. As you doubtless are aware, a contract was entered into between the Pacific Bridge Company and other Portland contractors with the International Portland Cement Company of Spokane, covering their entire requirements.

While it is possible that some of these contracts may be assigned to us, you, I think, will agree with me that inasmuch as you had nothing to do with the making of the contract between the Bridge Company and the International Company, you would not be entitled to any commission, particularly as we would doubtless have to pay the International something for making the assignment.

However, the fact is I am quite sure the Bridge Company, if any assignment is made, will insist upon being given either Standard or Santa Cruze cements, as the manufacturers of those brands dock practically all of their cement in the dock of the Pacific Bridge Company in Portland.

Under the circumstances, don't you agree with us that we could not afford to pay two commissions on an order which your firm had nothing to do with placing?

Yours truly,

JCE*T. .....President."

IX.

The Court erred in overruling the objection of these defendants to a letter from Bennett Hardware Company to J. C. Eden, dated April 30, 1915, and in admitting said letter in evidence, and to be read to the jury. This letter is marked "Plaintiff's Exhibit 41." The substance of the letter is that if the company's cement is to be used it would probably go through Balfour-Guthrie; that the writer saw cement being unloaded from a schooner at the Pacific Bridge dock and supposed it is a California proposition.

X.

The Court erred in overruling the objection of defendants to letter dated March 24, 1914, written by Superior Portland Cement Company to F. T. Crowe & Company of Tacoma, quoting a reduction from $1.60 to $1.50 per bbl. at the factory when the cement was purchased by a state or county only, and in admitting said letter in evidence and to be read to the jury. This letter is marked "Plaintiff's Exhibit 49."

XI.

The Court erred in overruling the objection of defendants to a letter written by the Superior Portland Cement Company dated June 1, 1914, to F. T. Crowe & Company of Tacoma, and in admitting said letter in evidence and to be read to the jury. The substance of this letter is quoting of prices to Olympic Hardware Company and Gray at Puyallup of $1.20 f. o. b. mill instead of $1.10, saying $1.10 was the railway price and adding that the writer had some hope of getting price matters straightened and getting down to some basis so one might know what the price of cement really is. This exhibit is marked "Plaintiff's Exhibit 51."

XII.

The Court erred in overruling the objection of these defendants to a letter written from Olympic Portland Cement Company signed Balfour-Guthrie to F. T. Crowe & Company, dated July 17, 1914, quoting price of $1.90 net less 15c commission, sacks extra, and in admitting such letter in evidence and to be read to the jury. This letter is marked "Plaintiff's Exhibit 52."

XIII.

The Court erred in overruling the objection of these defendants to a letter written by the Superior Portland Cement Company to F. T. Crowe & Company of Tacoma, quoting $1.90 net f. o. b. Seattle, dated July 17, 1914, and in admitting said letter in evidence and to be read to the jury. This letter is marked "Plaintiff's Exhibit 54."

XIV.

The Court erred in overruling the objection of these defendants to letter dated August 27, 1914, written by the Superior Portland Cement Company at Seattle to F. T. Crowe & Company at Tacoma, and in admitting this letter in evidence and to be read to the jury. This letter is marked "Plaintiff's Exhibit 56," and in substance refers to a telephone conversation and states that the Washington cement manufacturers had agreed between themselves that a certain order referred to in the letter should come to the Superior Portland Cement Company, stating that the Superior was putting in a bid of $1.85½, Washington at $1.97, and the Balfour-Guthrie & Company at $1.90 and requested Crowe & Company not to bid at all on this contract, or if they did bid to bid slightly above the Superior Portland Cement Company.

XV.

The Court erred in overruling the objection of these defendants to letter from Superior Portland Cement Company dated at Seattle December 31, 1914, to Crowe & Company of the same place, quoting price on cement effective January first $1.90 net, no commission, and

a second letter bearing same date from Olympic Portland Cement Company to the same party to the same effect, and a further letter from the Olympic Portland Cement Company to the same party dated Seattle, January 4, 1915, acknowledging the letter of Crowe & Company, dated January 2, 1915, and stating that program properly outlined and that Olympic would sell in carload lots at $1.90 to any consumer, leaving less than carload lots to dealers, and also a copy of letter from Crowe & Company to the Olympic, dated January 2nd, and also a letter from the Superior Portland Cement Company dated Seattle, January 12, 1915, to Crowe & Company at Tacoma, requesting Crowe & Company to confine their sales to Tacoma and the cement company would appoint other agents outside of Tacoma, and that both other factories were adopting the same policy, and also a letter from Superior Portland Cement Company dated Seattle, February 23, 1915, to said Crowe & Company, relating to the terms upon which its cement would be sold; and to admitting in evidence said letters and each of said letters and permitting the same and each of them to be read to the jury. Said letters form one exhibit marked "Plaintiff's Exhibit 57."

XVI.

The Court erred in overruling the objection of these defendants to certain letters offered in evidence and to admitting said letters in evidence and to be read to the jury, which letters were offered as one exhibit and were as follows:

Letters from Superior Portland Cement Company dated Seattle, January 13, 1916, to Crowe & Company,

Tacoma, quoting price $2.15 including sacks, f. o. b. Tacoma, allowance 7½c per sack, also letter from Superior Portland Cement Company, dated Seattle, January 13, 1916, to Crowe & Company, Seattle, quoting $2.30 f. o. b. Seattle, including sacks, sack allowance 7½c; also letter from Washington Portland Cement Company, dated Seattle, January 12, 1916, to Crowe & Company, Seattle, quoting price effective same date $2.30 f. o. b. Seattle, including sacks, sack allowance 7½c; also letter Olympic Portland Cement Company, dated Seattle, January 11, 1916, to Crowe & Company, Seattle, quoting price $2.30 f. o. b. Seattle, including sacks, sack allowance 7½c.

Said letters are offered as one exhibit and marked "Plaintiff's Exhibit 58."

XVII.

The Court erred in overruling the objection of these defendants to certain letters marked "Plaintiff's Exhibit 63," received by Galbraith Bacon & Company of Seattle, from Superior Portland Cement Company of Seattle, Washington, Portland Cement Company of Seattle, Olympic Portland Cement Company of Seattle, all dated February 10, 1914, and to admitting said letters in evidence and to be read to the jury. The substance of said letters was giving the same price and commission to all dealers.

XVIII.

The Court erred in overruling the objection of these defendants to a letter identified by witness Eden dated April 18, 1916, written by Eden to W. H. George, and

a letter dated April 24, 1916, attached to the same, both offered in evidence together and marked "Plaintiff's Exhibit 74" and the admission of said letters in evidence and the reading of same to the jury. Said letters are as follows:

"April 18, 1916.

Dear Will:

Was mighty sorry on my visit to San Francisco last week not to have had time to have a few minutes talk with you, not only to speak about the Association, but to thank you personally for the wonderful party you gave us in San Francisco when I was there about two months ago.

Regarding the Association matters, I think your objection to any contribution in excess of ¼c per barrel was the same as my own, viz.: that too much of the ¾c voted at the Association meeting in New York last December was to be divided to National advertising and to other uses that were of very doubtful value in our particular section of the country. I sincerely hope that you will be in accord with all of those present at the meeting with Mr. Beck in San Francisco last week agreed to do. So far as the Northwest is concerned, I am positive that the spending of the 80% of the ¾c per barrel contribution will be a very good investment, and will enable us to reduce a good share of the direct expense we have been put to in each individual company attempting its promotion work.

I don't know whether you formed as favorable an impression of Mr. Beck as I did, but he certainly

strikes me as being the right man in the right place, and I hope that you will join the rest of us in lending him your heartiest cooperation.

With kindest regards and hoping that I may see you again in a short time, I am,

Yours truly,

Mr. W. H. George, 2 Market Street,
San Francisco, California ."

"U. P. Compny, 1916 May 15 A. M. 7:20 Received
President's office Ret'd..... Portland Cement
1916, May 15, A. M. 8:32 Answered.. Association
Ref'd to..... May 15, 1916
Answ'd..... Noted BFA

HENRY COWELL LIME AND CEMENT COMPANY

2 Market Street
San Francisco, California, April 24, 1916.

Attention of Mr. J. C. Eden.
Superior Portland Cement Company,
Seattle, Washington.

My Dear Jack:

Replying to yours of April 18th, beg to advise that on April 20th I wired Mr. Beck as follows:

'We will stay with the Association under new plan until October first, the date when the year that we joined for is up. Will then consider the matter again. Am afraid local competitors will not stop private promotion.'

At first I was not sure about Beck, but the more I saw him the more I liked him and am willing to

play the string out for the term of our enlistment of one year from October 1, 1915, to October 1, 1916.

Altogether I am free to confess that I am not quite sure as to the advisability of all this. I feel as though a company like our own could probably to better advantage as far as its own interests were concerned, do its own promotion work, but I do realize that this looks like a selfish position, because if the others were all in the Association, promoting the Association work, we of course get some measure of benefit. This, at this time, is the real reason that keeps our company in the Association, with the further hope that during the balance of the time that we are in, that things will develop so that all hands will see the advisability of a Coast Association, as I thoroughly believe in this.

I hope before long to have an opportunity to discuss all of this personally with you.

Yours very truly,

W. H. GEORGE, Secretary."

XIX.

The Court erred in overruling the objection of these defendants to the introduction of certain papers identified by the witness Eden marked "Plaintiff's Exhibit 75," and to admitting said papers in evidence and to be read to the jury. These papers consist of telegrams passing between Muhs and Eden, between Eden and Coats, and between Woodworth, Vice-president of the Northern Pacific Railroad Company, and said Eden, all of said papers relating to the proposed freight rate upon cement from the International Portland Cement

Company to the City of Portland to enable said cement company to deliver its cement to Portland to fulfill the contract of Pacific Bridge Company, and show the effort made by the Washington companies and representatives of the Superior, the Washington and Olympic Cement Companies to prevent this rate being put in.

XX.

The Court erred in overruling the objection of these defendants to certain papers identified by witness Eden and marked "Plaintiff's Exhibit 76," and to admitting said papers in evidence and to be read to the jury, said papers consisting of certain correspondence passing between Aman Moore and J. C. Eden dated March 25, 1916, and relating to the manner of supervising paving work and contain the statement of Eden to the effect that inasmuch as his company probably would not participate in the cement business in Oregon, they could not see their way clear to assume any of the expense of promotion in Oregon.

XXI.

The Court erred in sustaining the objection of the United States to the introduction in evidence of certain papers identified by the witness Eden. These papers consist of publications of the Portland Cement Association published and circulated by cement companies and relating to the promotion of the use of cement and to educate the public in regard thereto.

XXII.

The Court erred in overruling the objection of these

defendants to certain letter identified by witness W. P. Cameron, to-wit, letter dated August 4, 1916, marked "Plaintiff's Exhibit 78," and certain other papers offered therewith marked "Plaintiff's Exhibit 79," and in admitting said papers in evidence and to be read to the jury. These letters consist of correspondence between Foster & Company of Hoquiam and the Washington Portland Cement Company, Olympic Portland Cement Company and the Superior Portland Cement Company of Seattle, dated in August and September, 1916. The substance of these letters was that Foster & Company were acting as dealers and distributors of all three Washington companies in Hoquiam and that vicinity, giving each of said companies a fair share of the tonnage and putting all three companies upon the same footing.

XXIII.

The Court erred in overruling the objection of these defendants to a carbon copy of a letter written by Tyler Henshaw to R. P. Butchart, marked "Plaintiff's Exhibit 89," and in admitting said letter in evidence to be read to the jury. Said letter is as follows:

"September 24, 1914.

Mr. R. P. Butchart,
Care Vancouver Portland Cement Company,
Victoria, B. C.

My Dear Mr. Butchart:

I have been trying very hard to find an opportunity to run up to Victoria to see you for a day, but have found it utterly impossible this time. I

wanted to talk to you about two things—both are of a very intimate nature, but on account of the very warm feeling that I have for you, and which I trust is to some extent reciprocated, I would not hesitate to talk or write you, but of course I would much prefer to talk to you.

The first is in regard to Carl Leonardt. He is a very peculiar man. He has off and on been trying to start a cement plant somewhere in southern California. Why, I don't understand, for he certainly knows the conditions as well as any man. Southern California is as much overproduced as any other section of the coast. After many abortive efforts to find a property, he finally located one apparently and seemed to have started in seriously to interest capital in it. This property is located out on Cajon Pass on the Santa Fe Railroad. It is not particularly well located, being four or five miles from a railroad, in a desert section of the mountains where it would be inevitably hard to keep men at work. He cannot produce his cement ever anywhere nearly as cheap as we are producting it, although we will concede him just as good a quality. Now he is attempting to go into an already overloaded market. I don't understand some people in this way, however I want to make my story as short as possible.

He came to San Francisco about two months ago and called in to see me. I asked him if he intended to put up a plant on his property, and he said yes. Then I went over the matter very friendly, kindly way with him; told him what the situation was; how terribly overburdened that section was with

cement; how the mills already there would have to wait ten or fifteen years until the demand grew up to the present output. All of which seemed to make little impression, but finally I said to him: Now, see here, Mr. Leonardt, we have been very loyal friends of yours; have given you your cement under the market right along; we have protected you in your business, and being a cement man as you are, you are doing this with your eyes wide open, therefore, it is only fair for me to say to you this; that we will not stand patiently by and see you put up another mill and add more trouble to our market. You have an indubitable right to put up a mill, but we have just as indubitable right to protect our market, and the moment you put your cement on the market we propose to put the price down where neither you nor ourselves can make any money, and we will continue it there.

Now, Mr. Butchart, I don't bluff. The situation there is so bad now with Colton and ourselves and the little Gordon state mill, that if Leonardt comes in with a mill we might just as well start in and clean up the the situation one time as another and let the man with the longest pole take the persimmon.

Leonardt thought this over and finally intimated he thought I was about right in my attitude, and told me if I would come down in the course of five or six weeks we would go down to the property and sell it out to me. No price was agreed upon, but he stated positively he would do so. I went down south, telephoned him, and he came over to Riverside. We took a machine and went out there and after look-

ing over the property I told him I was ready to buy it and to name his price and terms. He then began to shy and finally told me he would be up to San Francisco in about two weeks and would then settle the matter with me, which could only mean he would sell it to me. I tried to urge him to close up then, but he would not do so, but he again promised that within two weeks he would be up and sell it to me. I even said to him, you mean, you will sell this property outright to me, and he said, yes.

Now he is keeping out of my way. There is no question in my mind that he is going to try to interest capital. I don't think anybody would be foolish enough under the circumstances to go into the proposition with him. Freights are against him and he can't manufacture as cheaply as we can. My honest belief is that we can make $300,000.00 a year and keep him out of the market, or make him sell below cost. I may be wrong, but I firmly believe it and propose to tackle it anyway if he bobs up.

Now, without betraying any confidence as far as Mr. Leonardt is concerned, can you tell me whether he said anything to you about his plans down here? If so, what they were and whether you inferred he was seriously contemplating putting up a mill. I know you will tell me whatever you can properly, and I don't ask of you anything that is not proper for you to tell me, but whatever you do tell me will not go, under any circumstances, beyond my brother and myself.

Now, secondly, this must be considered by you as strictly confidential, but I am writing you per-

sonally so that you will have a full knowledge of the situation here in Oregon, and I am writing you only from that standpoint and because of my warm personal friendship.

I have bought a property here which I have been testing for something like a year. It is a property which in combination with our clinker, makes a cement of a remarkably high type. In fact, Mr. Butchart, in many ways exceeds regular Portland cement. This property will enable me to put a cement on the market here at a cost from 65c to 75c a barrel, not exceeding the latter price, and I think we can do it after a year's run, under the former price. Mind you, I am only talking of prospects. We are testing the material carefully in all directions; putting it into walls, putting it into highways; testing it under most unfavorable conditions, and so far it has shown up wonderfully. I am perfectly candid, and always with you my cards are never anything but 'face up on the table.' I am not quite through with my experiments with this cement, but will have finished them within the next three or four months, and will have it in practical use unknown to anyone except a few engineers. Within the next three of four months, I will have had over a year's full test upon the material, all compression and tension tests, etc., and will be in a position to know exactly what the material is. I shall put it on the market in Portland at not over, I think, $1.25 a barrel, and some of it for mass work, harder work, street work, and the like, will be sold for probably $1.00 to $1.10 in this market.

Now, I have heard nothing further for many, many months about the prospects of this Portland Cement Company here. I have understood you are not interested in this company here any further, although my information, naturally was not authentic, but anyway I want you to know privately and confidentially what my prospects are here, so that at least if you were contemplating any movement in regard to this cement plant, you would have full knowledge for your own personal benefit of what my prospects were. The whole plant that I will put up will not cost over $100,000.00 and my estimates already made and carefully checked, do not exceed $75,000 for a plant to produce safely 400,000 barrels per annum. I will say this further, that I do not expect to put on the market over 200,000 to 300,000 per annum anyway, but *if* this cement turns out as every test shows it to, covering a period of eight months or more, and *if* I can produce it with as little original investment, and *if* this little affair starts in without a dollar of indebtedness of any sort, and *if* I can produce it at the price I have stated or lower, it would be a serious competitor for any cement mill to face.

If there is anything further you would particularly like to know about it, write me any question and I will gladly answer you fully.

Regretting exceedingly that I did not find the time to run up and discuss these matters with you, and with warmest personal regards, I beg to remain,

Yours very sincerely.

P. S. In reading this letter over, while I have written it only from the friendliest motives, fear it may sound to you in the nature of a possible menace. I hope you know me well enough to believe that nothing of the kind is intended. The reason that I am writing is feeling that as I have a warm personal friendship for you, it seemed only justice to that friendship to tell you confidently the prospects that were before me in this market in the cement line. I can see no reason why there should not be room for us both, and as indicated I do not intend to come in here and try to supply the entire market. In fact, I know perfectly well that it would be impossible for me to do so, but at the same time I hope you understand that I am only telling you of these prospects (of course they are as yet only prospects) that might to some extent militate against any program you had set out in this market, if you are still connected with the Portland Cement Company here. You know that you and I could work side by side in this market without any trouble. I feared you might, if I said nothing about this before hand, feel that I had failed in the matter of friendship to you in not letting you know confidentially and beforehand."

XXIV.

The Court erred in sustaining the objection of the United States to a certain letter identified by witness Aman Moore written by Wirt Minor to Aman Moore, dated July 25, 1916, which said letter is as follows:

"July 25, 1916.

Mr. Aman Moore,
Care Mr. Coy Burnett,
Lewis Building, Portland, Oregon.

Dear Sir:

I am in receipt of communications dated July 24th addressed to the Directors of Oregon Portland Cement Company and signed by yourself, in which you demand that an immediate directors' meeting be called for the purpose of obtaining various data from the parties named; that is to say, Mr. R. P. Butchart, Mr. Newlands, Mr. Macdonald, Mr. Clark M. Moore, and Mr. Ballard to the end that suit may be instituted under the Federal 'Treble Damage Statutes' for the damages sustained by the company through alleged illegal agreement on the part of the gentlemen above named.

This matter was brought before the Board informally at its last meeting and you were requested by myself to state what action you desired to take, but for some reason you did not see fit to do anything whatever.

The by-laws of the corporation, article IV, section 4, provide that—

> 'Special meetings of the board of directors shall be called by the Secretary when he is requested so to do by the president, on three days' notice to each director.'

Special meetings shall be called in like manner on request of a majority of the members of the board. You are aware that the president of the cor-

poration is now absent. You yourself are one of its vice-presidents. Section 2 of article VI of the by-laws provides that—

> 'In the event of the absence of the president, one of the vice-presidents shall exercise the powers and perform the duties of the president during such absence, subject to the advice and control of the board or of the executive committee.'

You, therefore, have it in your power to call this meeting and I shall be pleased to have you do so. If you are not willing to take the responsibility of calling the meeting, I am perfectly willing to be one of a majority of the board to call such meeting. It will require this call to be signed by five of the directors; Mr. Butchart is away; Mr. Bates has tendered his resignation, but it has not been accepted as yet at your instance; Mr. Wilson has tendered his resignation, but the same has not yet been accepted; and Mr. Johnson is away. It will therefore be necessary for you to be one of the five directors to join in the call.

If you desire to have the meeting called, as suggested, and will come to my office, I shall take pleasure in preparing the call and in signing it. I do not know, however, whether Mr. Butchart and Mr. Newlands, who are charged by you with malfeasance in office, will consent to sign such call or not; if not, you will have to procure the signatures of Messrs. Wilson and Bates.

As Mr. Butchart and other directors are charged with malfeasance in office, I think it will be but rea-

sonable that the meeting when called shall be called for such time as to give these parties an opportunity to attend and respond in person.

Yours very truly,

WIRT MINOR."

XXV.

The Court erred in sustaining the objection of the United States to the introduction in evidence of a letter offered by defendants written by Wirt Minor to Aman Moore, dated August 29, 1916, and in refusing said letter to be introduced in evidence. The letter is as follows:

"August 29, 1916.

Mr. Aman Moore,
Oswego, Oregon.

Dear Sir:

As one of the directors of the Oregon Portland Cement Company and as one of the general attorneys or counsel, I hereby demand that you afford me an opportunity to investigate the facts upon which the suit brought by you in the name of the Oregon Portland Cement Company is based. In connection with this demand I also demand that you afford me an opportunity to examine all the evidence from which these facts have been deduced or inferred.

I also desire you to advise me by what authority this action was commenced, for as you are aware it was commenced without consulting the Board of Directors. I should be pleased to confer with your

attorneys at any time regarding the matter and to examine the evidence in their offices and to this end I am sending a copy of this letter to each of your attorneys of record.

I will add that I have been requested to take this step by several of the directors of the corporation.

Yours truly,

WIRT MINOR."

WM/MH

XXVI.

The Court erred in overruling and denying the motion of these defendants to instruct the jury to disregard all correspondence between Aman Moore and defendant Butchart prior to the time Clark M. Moore was elected sales manager in considering this case with regard to the guilt or innocence of Clark M. Moore, and that said correspondence should not be considered in arriving at the guilt or innocence of Clark M. Moore, and particularly to the statement made by the district court as follows:

"Of course any statement or admissions Mr. Butchart made before Mr. Moore became connected with this company would not be competent as admission of guilt against Clark M. Moore, but would be competent for the purpose of showing the status of the company and the condition at that time, and the admission made against the interest of Mr. Butchart."

XXVII.

The Court erred in overruling the objection of these defendants to certain correspondence passing between

Carl Leonardt and the witness W. H. George, consisting of letter from George to Leonardt dated Feb. 1, 1916, and the answer thereto dated Feb. 7, 1916, and the reply to said letter dated Feb. 8, 1916, all of which were offered as one exhibit marked "Plaintiff's Exhibit 105", and to the admission of said letters and each of them in evidence, and to the reading of said letters to the jury. These letters are as follows:

"(In pencil)
LB 10/13/20.

(letter head)

HENRY COWELL LIME AND CEMENT CO.,

2 Market Street,
San Francisco, February 1, 1916.
(to)
Mr. Carl Leonardt,
c/o Southwestern Portland Cement,
H. W. Hellman Bldg., Los Angeles.

My Dear Mr. Leonardt:—

I arrived home safely and want to thank you for your very kind and courteous treatment when I was at Los Angeles.

Please remember me kindly to Mr. Merrill and to Mr. Schirm.

I hope that by this time the get-together talk which I made it my particular business to give to all of those who are in the lime business, is bearing fruit and that the conditions are better and settled.

I congratulate you on the lay-out and character

of your new cement plant and trust that when she begins operation you will find a ready market for a reasonable output at the highest price and under regular terms and conditions.

Regarding regular terms and conditions; I enclose you herewith a little suggestion which I trust will be interesting. We have found it to work out to the best possible advantage here.

I hope to be able to write you in a few days that the allowance for returned empty sacks has been changed to 7½ cents.

Again thanking you and conveying to you my best personal regards, I remain,

Yours very truly,

W. H. GEORGE."

WHG-W

"Monday, February 7, 1916
(in pencil)
LB 10/13/20

Mr. W. E. George, Sec'y.
Henry Cowell Lime & Cement Company,
2 Market Street, San Francisco, California.

My dear George:

I received your letter of February 1st and thank you very much for the contents. That is the proper spirit! I refer to where you mention regarding our new cement plant that you 'trust when it begins operations we will find a ready market for a reasonable output,' etc. Some of our cement manufacturers seem to think that no one else has a right to

engage in the same business and manufacture and sell cement, which is entirely wrong as this is a free country and every man has a right to make an honest living and any combine to ruin a competitor by misrepresentation and crookedness is wrong, which soon or late they will find out to their sorrow if they do not change their tactics.

You know a good neighbor cannot live in peace if the bad neighbor does not want him to. The Portland plant as well as the Victorville plant wants to live in peace, but no man has the right to say that these plants have no right to manufacture or sell cement. These plants only want their rights which they hope to obtain by peaceful and harmonious methods. Of course you know what it means to a large manufacturer as compared to one that has less capacity, when it comes to price cutting. I leave it to you to say who can stand it the longest.

I was in San Francisco last Saturday, leaving the same evening. I talked with your office, but you were at the factory. Mr. Butchart was with me and no doubt will write you from Del Monte. You can see him at any time and go into details with him, and should something of importance come up I will be willing to go to San Francisco at any time.

Wishing you success, I am,

Yours very truly,

President."

"HENRY COWELL LIME AND CEMENT CO.

2 Market Street.

San Francisco, February 8, 1916.

(In pencil)

LB 10/13/20

Carl Leonardt, Esq.,
Pres. Southwestern Portland Cement Company,
710 H. W. Hellman Building, Los Angeles.

Dear Mr. Leonardt:—

I am just in receipt of yours of February 7th and hasten to reply. I am willing to admit the truth of every word that you say and you know how I feel about these matters. I feel that that is exactly the way they should be carried out.

Undoubtedly by this time you have my other letter written from the plant on last Saturday.

At this writing I am at a loss to know where Mr. Butchart is. My understanding was that he was going to Los Angeles, probably with you from San Francisco, altho my first impression was that he was going direct to Los Angeles. I have written him in your care at Los Angeles, and am now awaiting results as to whether it is best for me to go to Los Angeles, to see him at Del Monte when he goes there, or to await his arrival again at San Francisco.

When in Los Angeles I outlined to you what I wanted to say to Mr. Butchart, and I do hope that it will be agreeable and work to a satisfactory end. I shall be very glad indeed to advise you of all results.

Thanking you indeed for your many courtesies, I remain,

Yours very truly,

W. H. GEORGE,

WHG-W Secretary."

XXVIII.

The Court erred in overruling the objection of these defendants to the questions addressed to the witness W. D. Skinner, Traffic Manager of the Spokane, Portland & Seattle Railway, in regard to putting in a special rate on cement from Spokane to Portland in 1915 in order to get the haul on the cement for the Interstate Bridge, and to admitting said evidence or any thereof. Such evidence was in substance that the witness was Traffic Manager of the Spokane, Portland & Seattle Railway, sometimes called the North Bank Road; that prior to March 1, 1915, the rate per hundred pounds on cement from Spokane to Portland was 25c; that in the hopes of securing the cement for the Interstate Bridge, the witness undertook to make a rate of 13½c per hundred pounds from Irwin, a point near Spokane, to Portland. That as such Traffic Manager the witness had a right to make such rate; that he delivered a slip to the cement plant at Irwin stating that his road would publish a rate of 13½c on cement in carload lots from Irwin to Vancouver, Washington, or Portland if the Irwin plant secured a contract for the Interstate Bridge cement. That he was afterwards advised the Spokane plant had secured the contract; that objections were made by Eden and Coats of the Washington Cement plants, and the other cement plants to putting in such rate, and the mat-

ter was held in abeyance; that an adjustment was made between the cement companies, and the rate was not put into effect.

XXIX.

The Court erred in overruling the objection of these defendants to the introduction in evidence of a certain paper marked "Plaintiff's Exhibit 151", and to admitting said paper in evidence and to be read to the jury. Said paper is as follows:

> "S. P. & S. will publish rate 13½c on cement c/1 from Irwin, Washington, to Vancouver, Washington, and Portland, Oregon, if Irwin plant secured contract for Interstate Bridge cement. W. D. Skinner, F. T. M., Portland, Oregon, 3/6/15."

XXX.

The Court erred in overruling the objection of these defendants to a certain paper offered in evidence by the United States marked "Plaintiff's Exhibit 152", and to admitting said paper in evidence and to be read to the Jury. This is a letter from the International Portland Cement Company to W. D. Skinner, in which they state:

> "Have closed contract to furnish that cement, and confirming the writer's talk with you on the 6th inst., please see that the rate is published with the least possible delay."

XXXI.

The Court erred in overruling the objection of these defendants to certain papers identified by the witness

W. D. Skinner marked "Plaintiff's Exhibit 153", and in admitting said papers in evidence and to be read to the jury. Said papers were offered as one paper, and they consist of telegram of March 11, 1915, from the International Portland Cement Company to Skinner, as follows:

> "Have not received copy of tariff covering rate Vancouver and Portland. Acting upon agreement we have contracted to furnish approximately 10,000 tons. Must have tariff effective at earliest possible date."

and the reply of said Skinner thereto, as follows:

> "My hands tied temporarily as to publication of tariff. Have discussed situation fully with Pacific Bridge Company who are satisfied to leave matter in my hands for few days, when hope be able advise definitely."

XXXII.

The Court erred in sustaining the objection of the United States to a question propounded to witness F. R. Muhs, as follows:

> "Now give the jury some idea of how profitable it has been, say how much money in proportion to the capital your mills have made."

The witness had testified that the companies with which he was identified, the Santa Cruz Portland Cement Company, and the Standard Portland Cement Company after 1908 had made money, and the evidence sought to be elicited was for the purpose of showing

that the amount of money made had been small as compared with the capital invested.

XXXIII.

The Court erred in sustaining the objection of the United States to testimony tendered by defendants through the witness L. C. Newlands as to the reasonable cost of putting up the mill of the Oregon Portland Cement Company in 1915, and 1916, which evidence was offered for the purpose of showing the cost of the manufactured product, the defendants claiming that the cost or value of the factory is a proper element to take into consideration in ascertaining the cost of the manufactured product.

XXXIV.

The Court erred in overruling the objection of these defendants to the following question propounded to the witness H. S. McCracken:

"At what price did you sell cement at that time?" and erred in allowing said question to be answered. The witness McCracken was a dealer in cement in the City of Portland; he had testified in regard to prices which he paid for cement to the Oregon Portland Cement Company and other cement manufacturers, and the testimony admitted was to the effect that he sold cement at $2.30 because he could get no more for his cement than other companies could get; that the California companies were selling cement in Portland through their selling agencies, and were selling to the public at $2.30.

XXXV.

The Court erred in sustaining the objection of the United States to admission in evidence of a telegram offered by the defendants addressed to R. P. Butchart and signed by Charles Boettcher, E. Possett and R. J. Morse, dated July 27, 1916. This telegram had been identified by the witness Wirt Minor as a telegram shown to him or read to him by Aman Moore at a meeting held in his office by Aman Moore, Clark M. Moore, representing Mr. Boettcher, and Harry Ross, representing Mr. Butchart. The telegram is as follows:

"July 27, 1916.

R. P. Butchart,
Vanderbilt Hotel,
New York City.

We have inspected your plant here and have no criticisms to make of Mr. Newlands' management but on account of notoriety of lawsuit and damage to company would recommend Aman Moore be placed in charge of plant and quarries leaving sales as at present and that you wire Mr. Newlands to resign and permit the election of some new member to Board of Directors. We have talked to number stockholders here and they are unanimous that settlement should be made with Moore to prevent notoriety and damage of his suit. Bank also refuses to extend loan unless assured suit will not be brought. We have looked over figures in office and find we must have at once fifty thousand dollars more to meet pay rolls and bills. Wilcox will loan part if Board is reorganized. If change meets with your approval

will you kindly wire Teal and Minor attorneys and stockholders to call meeting and reorganize board and appoint Moore superintendent.

C. BOETTCHER
R. J. MORSE
E. POSSETT."

and erred in excluding said testimony.

XXXVI.

The Court erred in sustaining the objection of the United States to the admission in evidence of a telegram from the witness Clark M. Moore to Grant Fee, and a letter from Grant Fee to the witness. These papers were marked defendant's identification 112 and 113 respectively, and were excluded by the ruling of the Court. In substance they relate to the proposed visit of Clark M. Moore to San Francisco in August, 1916, and to a meeting which he wished to have with Grant Fee at that time with a view to selling him Oregon Portland cement for the erection of the Portland post office. The witness had testified in regard to the purpose for which he had gone to California and among other things he went there to see Mr. Fee and to sell him, if possible, the cement for the Portland post office, for which said Fee had obtained a contract.

XXXVII.

The Court erred in sustaining the objection of the United States to certain telegrams offered in evidence by defendants' identifications 114 and 115, and to the exclusion of said telegrams from the evidence by the

ruling of the Court. The witness Clark M. Moore had testified regarding a visit he had made in August, 1916, to San Francisco, and among other objects of that visit was to see a Mr. Hiltz who was representing the Portland Cement Association on the Pacific Coast with a view of having him come to Portland and arrange for an inspector on some road work, which was being done to see that the work should be done according to specifications, and in connection therewith the defendants offered certain telegrams as aforesaid for the purpose of showing this to be, among other things, his object in going to San Francisco.

XXXVIII.

The Court erred in that part of its charge to the jury, as follows:

> "Now the second count of the indictment, as I have already said to you, charges the defendants with monopolizing the trade or commerce between the states, in violation of section two of the Act, which provided that all persons who shall monopolize or attempt to monopolize or combine with any person or persons to monopolize any part of the trade or commerce among the several states, shall be guilty of a crime. To constitute the offense of monopoly, under the Act, it is necessary to acquire exclusive right to such commerce by means which will prevent others from engaging therein. The popular meaning of monopoly is the sole power of dealing in some particular commodity, in some particular market or place, or carrying on some par-

ticular business. Anything less than this is not a monopoly. The size of a business is not in itself a violation of this law. The Act denounced by the statute is the certain and necessary prevention of other persons engaging in such business and thereby stifling or preventing competition. The evil against which the statute is directed is not the enlargement of the trade of one person, but the destruction of the trade of others, in some commodity. It is the suppression of competition by the unification of interest or management, or by agreement or concerted action. It signifies the combining or bringing together into the hands of one person, or group of persons, the control, or the power of control, over a particular business or employment, so that competition may be suppressed by preventing others from engaging therein."

XXXIX.

The Court erred in that part of its charge to the Jury relating to the Portland Cement Company prior to the organization of the Oregon Portland Cement Company, as follows:

"There have been introduced in evidence some letters passing between Mr. Butchart and Mr. Aman Moore at a time prior to the date the Oregon corporation began marketing its product, and prior to the time that Clark Moore became connected with the concern. * * * They are, however, evidence against Mr. Butchart, and may be considered by you for the purpose of showing the conditions as they

existed at the time Clark Moore became Sales Manager of the Oregon Company."

XL.

The Court erred in that part of its charge to the Jury, as follows:

"Certain letters have also been introduced in evidence, written by Aman Moore and addressed to Mr. Butchart, which contain statements or suggestions concerning fixing prices or allotment of territory, by agreement with other manufacturers. The statements or suggestions contained in these letters are not evidence against Mr. Butchart, and do not tend to prove the connection of Butchart with any such agreement or combination, unless it appears that he acquiesced in the suggestion, or acted thereon, or combined with other manufacturers in accordance with the statements or suggestions so made by Moore.

"Various letters have also been introduced written by officials, or associates of officials of cement manufacturers in Washington and California, to defendants Clark Moore and Butchart. Any statements, suggestions, or requests contained in any such letters are not to be taken or deemed as evidence of the guilt or innocence of the defendants Moore or Butchart, unless Butchart or Moore acquiesced in such statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions made or contained in the letters, but these letters are a part

of the evidence, showing the relation existing between these people, and their conduct and actions, and for that purpose are competent and should be given such weight as you gentlemen may think they are entitled to."

and the Court erred particularly in that portion of the charge, as follows:

"* * * but these letters are a part of the evidence, showing the relation existing between these people, and their conduct and actions, and for that purpose are competent and should be given such weight as you gentlemen may think they are entitled to."

XLI.

The Court erred in that part of its charge to the Jury, as follows:

"There has also been some testimony to the effect that charges of illegal combination were made to the directors of the Oregon Company in June, 1916, and perhaps later. These charges culminated, as you will recall, in certain suits or actions brought by Aman Moore against certain officers or directors of the Oregon Company, and also resulted in the appointment of a stockholders' committee, to investigate these charges. The opinion of this committee, or of any director, as to the truth of the charges, is quite immaterial and should be disregarded by you. The fact that such charges were made, however, may be considered by you in connection with the manner of conducting the business

of the Company, and you may compare what was done before and after the charges were made and these suits filed, if there was any change in the manner of doing business, in passing upon the guilt or innocence of the defendants; and it is for you to determine whether sales, if any, made in Washington, after the making of these charges, were designed or intended for the purpose of evading such charges."

and particularly the Court errer in that part of said charge as follows:

"* * * The fact that such charges were made, however, may be considered by you in connection with the manner of conducting the business of the Company, and you may compare what was done before and after the charges were made and these suits filed, if there was any change in the manner of doing business, in passing upon the guilt or innocence of the defendants; and it is for you to determine whether sales, if any, made in Washington, after the making of these charges, were designed or intended for the purpose of evading such charges."

XLII.

The Court erred in that part of its charge to the July, as follows:

"Mr. Butchart, however, while upon the stand, testified that he did not make certain statements attributed to him by Aman Moore, but said nothing about the letters written by him to Aman Moore,

nor did he say anything about the meeting in San Francisco, referred to in these letters, nor offer any explanation of the letters, or any other statements contained therein. Now this was his privilege, and being a defendant he could not be required to say more if he did not desire to do so, nor could he be cross-examined as to matters not covered by the direct testimony, but upon passing upon the evidence in this case for the purpose of finding the facts, you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted, in that case, to comment unfavorably upon the defendant's silence. But where a defendant elects to come upon the witness stand and testify he then subjects himself to the same rulings that apply to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the circumstances, in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence, if there is any against him, he would have done so."

and the Court erred particularly in that part of the charges, as follows:

"* * * Nor did he say anything about the meeting in San Francisco referred to in these letters."

XLIII.

The Court erred in that part of its charge to the Jury, wherein the Trial Court instructed the Jury in regard to certain letters written by Aman Moore to R. P. Butchart, and which contain statements or suggestions concerning fixing prices by alloting territory by agreement with other manufacturers, and particularly to that part of the charge wherein the Court submitted to the Jury said letters as evidence against the defendant R. P. Butchart, as follows, if

"it appears that he acquiesced in the suggestions, or acted thereon, or combined with other manufacturers in accordance with the statements or suggestions."

XLIV.

The Court erred in refusing to charge the Jury as requested by defendants in writing, as follows:

"Portland cement is a mineral product. Certain earths or minerals, principally lime and clay, are mixed in specific proportions, fused by intense heat into a new uniform composition known as klinker and this klinker ground to an impalpable powder with certain ingredients added, is the Portland cement of commerce. It is sold by barrels, for in the earlier stages of the industry the containers were always wooden barrels. The net content of such barrel was

376 pounds of cement. In the latter development of the industry the practice obtained and now rules upon the Pacific Coast of packing the cement in sacks, each sack weighing 94 pounds. Thus four of these sacks equal one barrel, but the sales are still in terms of barrels, and mill capacity is spoken of in terms of barrels. When of a given mill it is said that it has a capacity of 1000 barrels, it means that working to capacity that mill can output 1000 barrels a day.

"In the sales of cement on the Pacific Coast provision is usually made to compensate the ultimate purchaser for a return of sacks in good condition. In this regard the usual allowance is from 7½ to 10 cents per sack.

"To the successful manufacturer of cement a factory requires its limestone quarry, and its clay deposit; the other ingredients, such as gypsum, etc., usually being purchased abroad. The rough materials brought to the mill are subjected to a drying heat, to grinding to a given degree of fineness, to admixture in due proportions, and then to an intense heat in kilns. The product of this is known as klinker. The klinker marks the termination of the first stage in the production of cement. It may be heaped in piles and exposed to the air and improves rather than deteriorates by this from the beneficial chemical changes which result from the action of the oxygen in eliminating the free lime which the klinker may contain. In the second process of manufacture the klinker is ground to an extreme fineness,

thoroughly mixed with the minor ingredients and transported to the warehouse or packing house as the completed product ready for the market. The principal ingredients being furnished by the earth in a state of nature the cost of these in their primitive state is not as a rule great. That cost is principally composed of the investment in mill machinery and of labor. The mill machinery is complicated and expensive. Dryers, grinders, kilns, conveyors, etc. Much heat being necessary, the fuel item is an extremely heavy one. Owing to the nature of the process by which cement is made the necessary application of intense heat, the kilns and other machinery are subject to rapid deterioration in use. The life of a cement mill in operation is ten years, or in other words, the necessary renewals and replacements have in ten years substituted a completely new set of machinery for the original."

XLV.

The Court erred in refusing to charge the Jury as requested by defendants, as follows:

"Portland cement is an article of commerce and under the law must be tested before it is placed upon the market and any brand of Portland cement which stands these tests and fulfils the requirements of the law can be used in all work in which Portland cement is used."

XLVI.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"Every manufacturer has the right to ascertain in any legitimate way the price at which goods manufactured by others and competing with the product of his mills are sold. Competing manufacturers issuing price lists from time to time may legally exchange their respective price lists. Competing manufacturers may lawfully advise one another of the territory in which their manufactured products are marketed, and may lawfully advise one another of the prices at which their respective products are put upon the market. Giving and receiving such information is not forbidden by law."

XLVII.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"It is therefore a natural conclusion that the mere fact that a manufacturer of Portland cement in the State of California, Oregon, and Washington may have issued from time to time price lists or circulars stating the price at which and terms on which the product of his factory would be sold, and that a similar price list or circular letter may have been issued by some or by all other manufacturers of Portland cement in said states and that in all of said price lists or circular letters issued at or about the same time the price of Portland cement is the same and the terms of sale the same, will not in itself constitute a violation of the statute or be in contravention of the law nor can you find the defendants guilty upon evidence of this character alone even

though you should find that every manufacturer sold his product at the same price and upon the same terms. To constitute a violation of the law there must also be evidence which satisfies your minds beyond a reasonable doubt that such prices or terms were fixed by agreement or combination between the several manufacturers and that defendants Butchart and Moore were parties to such agreement or combination."

XLVIII.

The Court erred in refusing to charge the Jury as requested by these defendants in writing as follows:

"Every manufacturer of Portland cement has the legal right to determine from time to time the territory in which the parties to whom, the prices at which, and the manner in which the product of his factory shall be sold. He may also issue price lists or circulars and employ any other method which he may desire to advertise or sell the product of his mill. Such conduct is not a violation of the statute under which the defendants are indicted or in contravention of any law."

XLIX.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"Every commodity such as Portland cement is under normal business conditions put upon the market for sale and sold and the average price at which

such commodity is sold is commonly designated as the market or market price. Under normal conditions Portland cement is sold in this manner and the price at which it is so sold from time to time would constitute the market price at the time. Such market price naturally changes from time to time due to cost of manufacture, cost of transportation, supply and demand, and to other causes too numerous to enumerate. Each sale affects and therefore each manufacturer in offering and selling his factory's output necessarily contributes to making the market price, and of course such action on his part is not in violation of law. It is only the making or fixing of the market price by agreement, combination or conspiracy with other manufacturers which is prohibited, so that if you are not satisfied by the evidence beyond a reasonable doubt that either of the defendants Butchart and Moore, as officers or agents of Oregon Portland Cement Company did agree or combine or conspire with other manufacturers of Portland cement in the states above mentioned to make or fix the market price for Portland cement, or agree or combine or conspire with other manufacturers to limit the territory in which Oregon Portland Cement Company should sell its products or agree or combine or conspire with other manufacturers to limit the territory or fix the price at which the products of the mill of some other manufacturers should be sold, you must return a verdict of not guilty."

L.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"I have permitted the Government to introduce evidence tending to show that in 1915 the Spokane, Portland & Seattle Railway Company promised to reduce its freight charges upon Portland cement from Irwin, Washington, to Portland, Oregon, and Vancouver, Washington, and that the Western Washington Cement Manufacturers and some of the Northern California Cement Manufacturers combined to defeat such proposed change in the freight rate and that they succeeded in defeating the same by promising to supply cement from their mills for the Interstate Bridge at the price at which cement for this purpose was offered by the Irwin plant if the rate had been installed. Such action on the part of the Western Washington and California manufacturers, if proven to your satisfaction, would not constitute a violation of the statute on which this indictment is based."

LI.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the anti-trust act was passed, a definite legal signification. Not every combination in restraint of competition is in restraint of trade. But

it does not necessarily follow that restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish interstate trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition with regard to their purpose or direct effect to restrain 'trade or commerce among the several states.' To what extent the anti-trust act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated, and it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

"The language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. Restraint of interstate trade and restraint of competition in interstate trade are not interchangable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade."

LII.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"Even if you are satisfied from the evidence that

there was an agreement or conspiracy or combination or a concert of action among the manufacturers of Portland cement in the states above mentioned to define the territory in which or the prices at which the product of the several factories or mills should be sold, yet such agreement, conspiracy, or combination is not necessarily within the prohibition of the statute, for to constitute a violation of the statute you must also be satisfied from the evidence beyond a reasonable doubt that said manufacturers thereby intended to restrain interstate commerce in cement in the market for Portland cement to an unreasonable degree, or that interstate commerce in cement was thereby restrained to an unreasonable extent."

LIII.

The Court erred in refusing to charge the Jury as requested by those defendants in writing, as follows:

"It is entirely lawful for anyone to do what he can to prevent a transportation company from putting in a freight rate which he may deem unjust and discriminatory, and which he may think will injuriously and unjustly affect his business. Any number of persons who may be similarly situated may join in opposing the installation of such freight rate. It is in evidence that the Western Washington Cement Manufacturers and some of the Northern California Cement Manufacturers combined in 1915 to defeat a proposed change or reduction in the freight rate on cement from Irwin, Washington, to Portland, Oregon, and Vancouver, Washington, but this

action on their part was legitimate and lawful, and does not constitute any violation of the Sherman Act."

LIV.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"Manufacturers of Portland cement may lawfully ascertain the markets or territories in which and the price or prices at which other manufacturers of Portland cement sell or market their products, and haveing this information or knowledge may use the same in marketing their own product so long as they do not agree or combine or conspire with such other manufacturers, but act independently of them. It is only actions taken by agreement or combination or conspiracy with other manufacturers which the law prohibits."

LV.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"The indictment charges that an agreement, combination, or conspiracy was entered into between certain parties representing certain manufacturers of Portland cement in the states of California, Oregon, and Washington, to control or limit the territory in which the output of the several factories should be marketed and to fix the prices at which it should be sold, and that defendants Butchart and Moore, as the officers and agents of Oregon Port-

land Cement Company were parties to or became parties to such agreement, combination, or conspiracy, and that such agreement, conspiracy, or combination was entered into for the purpose of restraining interstate commerce in Portland cement in said states, and that such interstate commerce was thereby actually restrained. Before you can find either of the defendants Butchart or Moore guilty, you must therefore find or be satisfied by the evidence beyond reasonable doubt, first, that such agreement, conspiracy, or combination was entered into by the defendants named in the indictments or by some of them; second, that such agreement, combination, or conspiracy was entered into for the purpose of restraining interstate commerce in Portland cement in said states; third, that it did restrain or restrict such commerce; fourth, that the defendant or defendants Butchart and Moore were parties to or became parties to said agreement, conspiracy or combination; fifth, that the defendant or defendants Butchart and Moore were parties to or became parties to said agreement, conspiracy, or combination as officers or agents of Oregon Portland Cement Company; and sixth, that interstate commerce in said states in Portland cement would necessarily be restrained or was actually restrained by such alleged agreement; conspiracy or combination to an unreasonable extent or degree. If you find that one of the defendants Butchart or Moore was not a party to such agreement, combination or conspiracy, you must find him not guilty, and if you find that neither

of the defendants Butchart or Clark M. Moore was a party thereto, you must return a verdict of not guilty in favor of each of said defendants."

LVI.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"There is no evidence in this case which tends to show that either R. P. Butchart or Clark N. Moore monopolized or attempted to monopolize the trade or commerce in Portland cement among the states or combined with any person or persons to monopolize any part of the trade or commerce in Portland cement among the several states. You will therefore return a verdict in their favor in the second count of the indictment."

LVII.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"The evidence before you is not sufficient to establish the guilt of the defendant R. P. Butchart, and you are hereby directed to return a verdict in his favor of NOT GUILTY."

LVIII.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"The evidence before you is not sufficient to establish the guilt of the defendant Clark M. Moore,

and you are hereby directed to return a verdict in his favor of NOT GUILTY."

LIX.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"Certain letters have been introduced, written by Aman Moore and addressed to R. P. Butchart, which contain statements or suggestions concerning the fixing of price, the allotment of territory, or agreements with other manufacturers. I instruct you that statements or suggestions made by Aman Moore recited or contained in such letters are not evidence against said Butchart and do not tend to prove the connection of said Butchart with any such agreements or combinations, unless it be further shown independent of such statements or suggestions so made by said Aman Moore and contained in said letters, that said Butchart acquiesced in said statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions so made by said Aman Moore and contained in said letters."

LX.

The Court erred in refusing to charge the Jury as requested by these defendants in writing, as follows:

"Letters have been admitted in evidence written by Aman Moore to R. P. Butchart and by R. P. Butchart to Aman Moore dated prior to April 14, 1916, the date upon which Clark Moore was se-

lected or appointed Sales Manager for the Oregon Portland Cement Company. Any statements contained in such letters or correspondence are not evidence for or against Clark Moore, unless you should find that such letters show a combination, conspiracy, or agreement as charged in the indictment, and that after Clark Moore became Sales Manager of the Oregon Portland Cement Company on April 14, 1916, he acted in furtherance of such combination or conspiracy and aided, abetted, or assisted in carrying out and performing the agreements so made."

LXI.

The Court erred in refusing to charge the Jury as requested by these defendants, in writing, as follows:

"Various letters have been introduced written by officials or associates of officials from cement manufacturers in Washington and California to defendants Clark Moore and R. P. Butchart. I instruct that any statements, suggestions, or requests contained in such letters are not to be taken or deemed as evidence of the guilt or innocence of defendants R. P. Butchart and Clark Moore unless it be further shown by evidence independent of the statements contained in such letters that defendants Butchart or Clark Moore acquiesced in such statements and acted thereon or combined with other cement manufacturers in accordance with the statements or suggestions so made or contained in said letters."

LXII.

The Court erred in overruling and denying the motion and application of each of these defendants to set aside the verdict of the Jury returned in this cause, and to grant a new trial to each of these defendants.

There are four headings which naturally suggest themselves in the presentation and discussion of the issues involved in the instant case.

FIRST: THE INDICTMENT WAS DEFECTIVE, THE DEMURRER SHOULD HAVE BEEN SUSTAINED, AND NO EVIDENCE COULD BE LEGALLY SUBMITTED UNDER AN INDICTMENT SO DEFECTIVELY DRAWN AS THE ONE IN ISSUE:

SECOND: ERRORS COMMITTED BY THE TRIAL COURT IN ADMITTING EVIDENCE WHICH WAS INCOMPETENT AND IRRELEVANT AND PREJUDICIAL TO THE RIGHTS OF EACH OF PLAINTIFFS IN ERROR:

THIRD: ERRORS COMMITTED BY THE TRIAL COURT IN EXCLUDING EVIDENCE WHICH WAS COMPETENT AND RELEVANT AND HAD A TENDENCY TO EXPLAIN THE ACTIONS AND CONDUCT OF EACH OF PLAINTIFFS IN ERROR:

FOURTH: ERRORS COMMITTED BY THE TRIAL COURT IN ITS CHARGE TO THE JURY.

THE INDICTMENT WAS DEFECTIVE, THE DEMURRER SHOULD HAVE BEEN SUSTAINED, AND NO EVIDENCE COULD BE LEGALLY SUBMITTED UNDER AN INDICTMENT SO DEFECTIVELY DRAWN AS THE ONE IN ISSUE.

The indictment is founded upon the Act of July 2, 1890, commonly known as the Anti-Trust Act, and attacks the trade in Portland cement as conducted by the concerns of which the defendants are respectively officers and agents in the territory embraced by Western Washington, Western Oregon, and the State of California.

The indictment in the first count purports to charge the defendants with violation of the first section of the Statute, and alleges that they are engaged in a combination in undue and unreasonable restraint of trade in cement conducted by the several concerns with which they are respectively connected.

The second count charges that the matters set forth in the first count also constitute monopolizing trade and commerce within the meaning of Section Two of the Act.

Defendants demurred to the first count, contending that the same is defective because:

First—The facts set forth do not constitute an offense.

Second—That no description of any combination in restraint of trade and commerce is set forth or alleged.

Third—The averments are too general, vague, indefinite and uncertain to inform defendants of the nature or cause of the accusation against them or any of them, or to apprise them with reasonable certainty of the offense with which they are charged, or may expect to meet on the trial.

The first ground of demurrer includes the second and third, as well as the objection that the indictment is not sufficiently definite and certain to enable the Court to determine what acts the Government claims violated the Statute, or whether such acts constitute a violation thereof; and further, that the indictment does not contain a direct averment laying venue within the jurisdiction of the Court.

Condensed, Count One of the indictment, without omitting any allegation of fact or averment which might be resorted to to sustain the same, is as follows:

"That divers concerns (naming those known to the Grand Jury) have, during the ten years last past manufactured cement in the State of California and west of the Cascade Mountain Range in the States of Washington and Oregon, and have engaged in the sale of the same directly and indirectly to consumers;

That practically all of the cement consumed in the territory mentioned during this time has been manufactured by said concerns (known and unknown); that large portions of the cement so manufactured was sold by the said manufacturers to consumers and dealers situated in states other than the one where the cement was manufactured, and large portions thereof were consigned to dealers and agents of the respective concerns in such other states for sale there by such agents and dealers; that such manufacturer selling, consigning and shipping constitute trade and commerce among the several states of the United States, and throughout said ten years each of said concerns has been engaged in said trade and commerce;

That since August first, 1914, the defendants named in the indictment were officers or agents (official capacity given) respectively of the several concerns mentioned therein, and that said defendants have been actively engaged at the respective (named) places of manufacture in the management,

direction and control of the business and affairs of the concerns with which they were severally connected; and, further, that said defendants continuously, during the period of time from the first day of August, 1914, to the day of the finding and presentation of the indictment unlawfully and knowingly have been engaged in a combination in undue and unreasonable, direct and oppressive restraint of said Interstate Trade and Commerce carried on by said several concerns—that is to say, a combination now here described in restraint of and which throughout such period of time has in fact restrained said trade and commerce in the manner now here set forth."

The indictment, however, fails to describe any combination or manner in which it is claimed it was understood or agreed among the defendants that trade and commerce should be restrained pursuant to the alleged combination, but proceeds

"By 'concerted action' defendants throughout the period from August 1st, 1914, to the finding of the indictment carried on and conducted the business of the several cement concerns with which they were respectively connected without any competition as to the localities in California, Oregon and Washington in which they respectively sold cement, and by concerted action prevented:

First—Southern California Company from selling or consigning for sale their cement in either Washington or Oregon.

Second—Northern California Companies from selling or consigning for sale their cement in Washington.

Third—Washington Companies from selling or consigning for sale their cement either in Oregon or California.

Fourth—Oregon Company from selling or consigning for sale its cement either in Washington or California.

Fifth—Oregon Company and Northern California Companies from selling or consigning for sale their cement in Oregon, otherwise than upon arbitrary and known competitive prices fixed and agreed upon between them in advance of such sales and consignments for sales."

It is then alleged that in consequence of such conduct and alleged want of competition:

(a) All consumers of such cement in the localities mentioned in Oregon, Washington, and California have been deprived of the benefits of competition in the particulars aforesaid.

(b) All consumers have been compelled to pay for such cement arbitrary prices and prices greatly in excess of the prices at which they would have secured cement if defendants had not engaged in said unlawful combination in restraint of such trade and commerce.

The indictment then concludes:

"And so the Grand Jurors * * * do say that said defendants * * * as aforesaid, during the period of time

from the first day of August, 1914, to the date of finding and presentation of the indictment in the said District Court of Oregon, and within the jurisdiction of this Court, and in the manner and form, and by the means aforesaid unlawfully and knowingly have engaged in a combination in restraint of trade and commerce among the several states, etc.

It will be noticed that Count One utterly and completely omits all description of a combination or description of the manner in which it was claimed the defendants understood or agreed among themselves that trade and commerce should be restrained pursuant to the alleged combination, and that aside from matters of inducement, which contain no charge of violation of law, the indictment absolutely fails to expressly allege any act or acts committed by defendants, or any of them.

The indictment is silent as to whether the combination was constituted by a union of capital or skill, and absolutely fails to state the means agreed upon or contemplated for effecting the alleged combination, whether formed by the defendants alone or by defendants in cooperation with others; whether the defendants originated the combination or became parties to a combination already formed does not appear. No facts are charged. The indictment is but a conclusion of law. It fails to define the offense. It furnishes no facts from which the Court can determine whether the restraint contemplated or to be effected was undue or unreasonable. All particulars constitutnig the offense are want-

ing. The indictment fails to allege or charge that the concerns mentioned were ever competitors or sold cement in the same territory, or in the territory in which it is averred sales were prevented, nor does it appear that the defendants named had power to control the business of the concerns mentioned. It contains no allegation of oppression or coercion, either of the parties to the combination, or of competitors or agents, or of reduction of supply or consumption, or of destroying or injuring the business of competitors or preventing them from doing business, and no allegation was made that prices were raised, or that prices obtained were unreasonable.

The allegations purporting to set forth what was done by defendants are vague, general, indefinite and uncertain, and are but the mere conclusions of the pleader, and are wholly insufficient for any purpose. They do not define or describe the particular combination referred to, nor the offense attempted to be charged, nor set forth the acts or any of them committed by defendants which constitute "engaging in a combination". They contain none of the particulars as to time, place and circumstances essential to a criminal charge. The indictment omits to lay venue by direct averment as required by the rules of the criminal pleading. Jurisdiction of the Court is made to appear only by conclusion of the pleader.

Count One of the indictment is therefore insufficient because—

1. It does not contain a description of, or set forth, or show any combination in undue or any restraint of trade and commerce.

2. The averments contained in said count are too general, vague, indefinite and uncertain—(a) to define the exact defense attempted to be charged; (b) to define the combination therein referred to or separate and distinguish it from any other combination in restraint of trade; (c) to inform or appraise the defendants of the nature or cause of the accusation against them with such reasonable certainty as to enable them to make their defense; (d) to enable the defendants to avail themselves of their acquittal or conviction against further prosecution for the same offense; (e) to inform the Court of the facts so it may decide whether they are sufficient in law to constitute an offense in support of conviction; (f) to inform the Court of the facts so that it may decide whether the alleged combination was designed to, or would in fact unduly or unreasonably restrain trade and commerce; (g) and further, the allegations purporting to set forth what was done by the defendants are insufficient because repugnant and inconsistent.

3. The indictment does not particularly charge any act as having been committed within the district of Oregon, and no venue is laid therein except by way of conclusion of the pleader made from previous allegations in the indictment, none of which allege the commission of any act within the district of Oregon.

4. By reason of the omissions and indefiniteness and uncertainty mentioned, no offense is charged in or by said count.

Where the statutory definition of an offense includes generic terms, or embraces acts which it was not the intention of the statute to punish, the indictment must state the species, it must descend to particulars.

U. S. vs. Cruickshank, 92 U. S. 542, 23 L. Ed. 588, 22 Cyc. 343;
Batchelor vs. U. S., 156 U. S. 426, 34 L. Ed. 478;
U. S. vs. Wardell, 49 Fed. 914;
U. S. vs. Kessel, 62 Fed. 59;
In re *Greene,* 52 Fed. 111;
U. S. vs. Patterson, 55 Fed. 605;
U. S. vs. Bopp, 230 Fed. 723.

In an indictment every fact necessary to constitute the crime charged must be directly and positively alleged. Nothing can be charged by implication or intendment, nor is it sufficient to charge any material matter by way of argument, conclusion, or recital.

U. S. vs. Cruickshank, 92 U. S. 542;
U. S. v. Hess, 124 U. S. 483;
U. S. vs. Ford, 34 Fed. 26;
U. S. vs. Post, 113 Fed. 852, 22 Cyc. 293.

Many combinations in restraint of trade are legal and even commendable.

U. S. vs. E. C. Knight Co., 156 U. S. 1 39 L. Ed. 35;

Hopkins vs. U. S., 171 U. S. 578;

U. S. vs. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 653;

Standard Oil Co. vs. U. S. 221 U. S. 1, 55 L. Ed. 619;

U. S. vs. Trans-Missouri Freight Association, 58 Fed. 58;

Whitwell vs. Continental Tobacco Co., 125 Fed. 454;

Union Pacific Coal Co. vs. U. S. 173 Fed. 737;

U. S. vs. Southern Wholesale Grocers' Assn., 197 Fed. 434.

Only combinations in undue restraint of trade are denounced by the statute.

Nash vs. U. S., 229 U. S. 373-376, 57 L. Ed. 1232;

U. S. vs. Whiting, 212 Fed. 475.

The indictment must describe the combination.

U. S. vs. Hess, 124 U. S. 483, 31 L. Ed. 516;
U. S. vs. Cruickshank, 92 U. S. 542;
U. S. vs. Post, 113 Fed. 852;
Etheredge vs. U. S., 186 Fed. 434;
U. S. vs. Beatty, 60 Fed. 740;
Stuart vs. U. S., 119 Fed. 89;
Dalton vs. U. S. 127 Fed. 544;
U. S. vs. Bernard, 84 Fed. 634;
Pettibone vs. U. S., 148 Fed. 197;
Vol. 5, Ruling Case Law, page 1085.

The requirement last above mentioned has been uniformly observed and applied.

U. S. vs. Patterson, 55 Fed. 605;
U. S. vs. McAndrews and Forbes, 149 Fed. 823;
U. S. vs. Patten, 187 Fed. 672, 226 U. S. 525;
U. S. vs. Nash, 186 Fed. 592, 596; 229 U. S. 373;
U. S. vs. Winslow, 227 U. S. 202;
U. S. vs. Patterson, 201 Fed 697;
U. S. vs. Swift, 188 Fed. 97.
U. S. vs. Rintelen, 233 Fed. 793.

The allegations of what was done to further an alleged combination are irrelevant and cannot be used to enlarge the necessary allegations of the indictment, and are of no avail.

U. S. vs. Patterson, 55 Fed. 605-639;
U. S. vs. Britton, 108 U. S. 199;
Pettibone vs. U. S. 148 U. S. 197;
U. S. vs. McAndrews and Forbes, 149 Fed. 823, 831;
McKenna vs. U. S., 127 Fed. 798.

There can be no monopoly which does not constitute an unreasonable restraint of trade.

U. S. vs. Whiting, 212 Fed. 466-478.

To constitute the offense of monopolizing or attempting to monopolize trade, it is necessary to acquire an exclusive right in such commerce by means which will prevent others from engaging therein. A monopoly in the prohibitive sense involves the element of an exclusive privilege or grant, which restrains others from the exercise of a right or liberty which they had before the monopoly was secured. In re *Green,* 52 Fed. 104.

A monopoly of trade embraces two essential elements (1) an acquisition of an exclusive right, (2) or the exclusive control of that trade to the exclusion of all others from that right and control.

U. S. vs. Trans-Missouri Freight Association, 58 Fed. 58-82.

The word monopolize used in section 2 of the act is the basis and limitation of the statute, and hence an indictment must show a conspiracy in restraint by engrossing or monopolizing or grasping the market.

U. S. vs. Patterson, 55 Fed. 605.

To constitute monopolizing, in addition to acquisition and acquirement, there must be an attempt by unlawful means to exclude others from the same traffic or business or from acquiring by the same means property and material things.

U. S. vs. Reading, 183 Fed. 456.

No monopoly exists when individuals own large quantities of a commodity and an indictment is fatally defective, which alleges only a scheme to demand monoplistic prices as a result of individual, as distinguished from collection effort.

U. S. vs. Patton, 187 Fed. 672.

The word "monopolize" is used in this section in a legal and accurate sense. Its root idea is to exclude. To monopolize trade or commerce or a part thereof is to exclude persons therefrom.

Patterson vs. U. S., 222 Fed. 599.

In the case of "loose combinations" where each party to the combination remains in the field, it is not proper to say that there is a monopolizing as in that contingency there is no exclusion.

Patterson vs. U. S., 222 Fed. 599.

The first sentence of Section 1 of the act so far as it applies to this indictment declares illegal every * * * combination in the form of trust or otherwise * * *in restraint of trade or commerce among the several states or with foreign nations.

The word "combination" at the time of the passage of the act had not and even now has no accurate and definite meaning in the criminal law. Of itself it means no more than cooperation or union of effort.

The word "trust" and the phrase "combination in the form of trust," however, were well understood at the time of the enactment of the Sherman law to mean any combination of capital, skill, or acts by two or more persons, firms, corporations, or associations for the purpose of monopolizing or restraining trade in any community to the injury of the public.

Penal Code Texas, Article 976;
Bates Annotated Statutes of Ohio, Section 4427;
General Statutes of Kansas, 7684.

The statutes above referred to are declaratory of the common law meaning of the word "trust" and phrase "combination in the form of trust" as understood at the time the Sherman law was passed and convey an accurate idea of the character and type of cooperation and association aimed at by the statute; that is, combinations formed by the capital, skill, or acts of the parties

to the combination were in the legislative mind. Accordingly, an indictment charging parties with engaging in a combination should clearly show whether the combination was formed by the union of the capital, the skill, or the acts, or all of them, of the parties to the combination.

The word "combination," unlike the word "conspiracy," does not in itself import crminal acts or criminal purposes.

Many combinations are legal, even commendable.

In *Nash vs. U. S.*, 229 U. S. 373, 376, the Supreme Court says:

> "Those cases (referring to the Standard Oil and American Tobacco Company cases) may be taken to have established that only such * * * combinations are within the act as by reason of the intent or the inherent nature of the contemplated acts prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

To charge an offense under the statute a combination prohibited by the statute as construed by the courts must appear. To accomplish this a description of the combination must be set out in the indictment showing not only who formed the combination and what was combined, whether capital, skill, or acts, but must show by direct and positive allegations what acts, what skill, or what capital was included in the alleged combination and that the clear intent or the inherent nature of the contemplated acts set out prejudiced public interest by

unduly restricting competition or unduly obstructing the course of trade, otherwise the court cannot say whether or not an alleged combination is illegal.

The second sentence of Section 1 of the act provides that every person who shall * * * engage in any such combination * * * shall be deemed guilty of a misdemeanor. The combination here meant is the one referred to in the first sentence of the section. To render one liable thereunder he need not have been a party to the formation of the conspiracy but may have become a party later on.

Where one comes into a combination after its formation the indictment should not only clearly describe the combination, its purposes, and the means devised to effect them, but should set forth the particular acts committed by the party charged which it is claimed constitute engaging in a combination so that the court can say whether as a matter of law the acts alleged made the person charged a party to the combination previously described in the indictment and constitute engaging therein.

In an indictment every fact necessary to constitute the crime charged must be directly and positively alleged. Nothing can be charged by implication or intendment, nor is it sufficient to charge any material matter by way of argument, conclusion or recital. The indictment in the instant case absolutely ignores such rule.

In the case of *U. S. vs. Cruikshank,* 92 U. S. 542, the court says:

"Where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, it must descend to particulars.' 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

None of these conditions are observed in the indictment under consideration. No particularity of time, place or circumstances is set forth from which defendants can determine what acts the government will rely upon. Only conclusions and recitals appear and therefore they could not prepare their defense. The particular offense is not defined, is not separate from other offenses so as to avail defendants of their conviction or acquittal for protection against a further prosecution for the same case. Innumerable forms of concert of action which constitute an illegal combination having the identical effect charged in the indictment may have

occurred and an indictment might be returned for each. Unless the particular form of concert of action by the indictment is disclosed the rule against a second prosecution for the same offense is not available. It was impossible for the court to tell from the indictment whether a combination in fact existed, whether defendants or any of them engaged therein, or whether the restraint referred to was undue or unreasonable.

The rules of criminal pleading require that every indictment define the offense sought to be charged; that is, separate the specific offense from the body of crimes, and particularly from all crimes of the same class as the one involved in the indictment. This requirement is exacted so that the defendant may avail himself of his conviction or acquittal, and also to enable the court to determine whether the particular acts charged constitute an offense. A crime is defined ordinarily within the rule under discussion by stating the particular acts committed by the defendant and the time and place where committed, together with the relation of such acts to third persons or to the public or to the particular subject matter involved. Count One of the indictment under consideration entirely omits to describe the combination referred to in the indictment. It contains no more than a charge in the language of the statute. The pleader apparently recognized the necessity of describing the combination for he uses the words "now here described" and "now here set forth" in the body of the indictment, but utterly fails to describe or set forth the crime attempted to be charged.

The case of *U. S. vs. Hess,* 124 U. S. 483, is probably the leading case upon the principle or criminal

pleading which requires a particular description of the combination, scheme or conspiracy where the same constitute an essential element of an offense under the federal statutes. That and other cases announcing the same requirement, however, only apply the elementary and fundamental rule that a crime must be particularly defined. In such case the court says:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially or by way of recital."

In the Hess case the indictment charged in the language of the statute that the defendant devised a scheme to defraud without properly describing the scheme and further charged that a letter was mailed in furtherance of the scheme. It is plain that averments of mailing a dozen letters, even though the contents of the letters set out showed a scheme to defraud, would not supply the

omitted description of the scheme. So in the instant case the omission to describe the combination cannot be aided or supplied by allegations of what was done pursuant to the alleged combination.

The rule in the Hess case was applied by the court in the case of *United States vs. Bopp,* 230 Fed. 723. There the defendants were charged with conspiracy to commit the offense of beginning or setting on foot or providing or preparing means for a military expedition in violation of Section 13 of the penal code. The court in sustaining a demurrer to the indictment said:

> "Neither this statute nor any other declares what is meant therein by the words 'military enterprise,' nor what would be required to constitute such an enterprise, so that in giving effect to the statute the court must determine from other sources what Congress meant when it used these words. So far as the conspiracy itself which is charged in this indictment is concerned, it is stated in the language of the statute without amplification; that is to say, there is no statement that defendants conspired to do certain things which, if accomplished, would in the judgment of the pleader constitute the beginning or setting on foot or the preparing or providing means for a military enterprise, and upon the sufficiency of which things to constitute such offense the judgment of the court might be exercised.
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> * * * * * *
>
> The sole charge against the defendants here is that they conspired 'to begin and set on foot, and

prepare and provide the means for certain military enterprises.' This is the bald language of the statute; the mere conclusion of the pleader. But the particular things which they conspired to do are not stated—the things which, if in fact accomplished, would constitute the setting on foot or providing means for a military enterprise. What does the pleader understand the words 'military enterprise' to mean? What in his judgment constitutes a military enterprise? The indictment gives neither the defendants nor the court any information in this regard, and the things that the pleader might regard as sufficient to warrant him in asserting that defendants conspired to set on foot or provide means for a military enterprise might in the jurgment of the court fall far short of being the things intended by the statute."

The charge in the indictment in the instant case that defendants engaged in a combination, like the allegation in the Bopp case that defendants conspired to set on foot a military enterprise, is a mere conclusion of the pleader and that is not sufficient as a criminal pleading in this case any more than it was in the Bopp case.

In *Batchelor vs. United States,* 156 U. S. 426, the court in discussing the sufficiency of an indictment charging wilful misapplication of the funds of a national bank under Revised Statutes Section 5209, said:

"By the settled rules of criminal pleading, and by the previous decisions of this court, the words

'wilfully misapplies,' having no settled technical meaning (such as the word 'embezzle' has in the statutes, or the words 'steal, take and carry away' have at common law) do not, of themselves, fully and clearly set forth every element necessary to constitute the offense intended to be punished; but they must be supplemented by further averments, showing how the misapplication was made, and that it was an unlawful one. Without such averments, there is no sufficient description of the exact offense with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause."

The words "engage in a combination" do not describe the exact offense with which the defendants are charged any better than do the words "wilfully misapply" in the Batchelor case.

The principles established by those cases exact of the prosecution only common fairness to defendants. One of the courts said in discussing an indictment under Section 5480 Revised Statutes, now Section 215 of the Penal Code, that one of the reasons for requiring a clear and definite description of the scheme or artifice to defraud grew out of the fact that all schemes to defraud were not criminal. The same reason applies to the requirement that a combination be definitely described. All combinations in restraint of trade are not illegal. Only those that unduly or unreasonably restrain trade are so. "An indictment must allege facts

warranting a finding by the jury that the restraint was unreasonable."

United States vs. Whiting, 212 Fed. 479.

Further analysis of the indictment will demonstrate that it is vulnerable to the objection of indefiniteness and uncertainty made by the demurrer. Aside from identifying the defendants, the first three pages and down to the center of page four consist of matter of inducement. Neither in this part of the indictment nor elsewhere therein does it appear that any of the companies with which the defendants were connected were ever competitors. For all that appears from the indictment the Oregon company and the California companies may never have sold any cement in Washington, and if they did the same may have been sold in Eastern Washington or in a portion of Washington never supplied by the Washington companies. The Washington companies may have sold cement in Oregon or they may not have so far as the indictment shows, but if they did so sell cement the same may have been sold in territory not supplied by either the Oregon or California companies. The same absence of definite allegation occurs with respect to trade in California. No allegation of oppression or coercion either of the parties to the alleged combination or of competitors or others occurs. No allegation of reduction of supply or consumption is made. No charge of destroying the business of competitors or preventing them from doing business is made. There is no allegation that prices were raised or that the prices obtained were unreasonable. It is not alleged

that the concerns mentioned in the indictment manufactured or sold practically all of the cement used in the territory in question but that divers concerns did so. It is not alleged what part of the trade the divers concerns not named had, nor how many of much divers concerns existed. It is not alleged that the defendants controlled the business of the concerns with which they were connected respectively nor what part they had in such control, but only that they were actively engaged in the management, direction, and control of the business of the concerns. It is not stated whether the concerns were co-partnerships or corporations, or how they were conducting business. The omitted information is all material to a charge such as the one suggested by this indictment.

Following the description of the defendants on page four of the indictment occurs the charging part thereof, which actually ends with the words "here set forth" on that page. This part of the indictment omits to lay venue and omits to state whether the combination mentioned therein was formed by defendants alone or by them and others and contains the mere conclusion of law that defendants "engaged in a combination." It omits to describe or set forth the character of the alleged restraint of trade, either as to quantity or territory, but contains only a promise to describe the combination and the manner in which it restrained trade. No authority can be found holding that this charge in itself is sufficient, while the books are full of precedents holding that it is not sufficient.

The pleader knew the necessity of describing the combination and the manner contemplated thereby for

effecting the alleged restraint of trade or the promise to set them forth would not have been made.

Instead of fulfilling the promise mentioned, the next paragraph contains indefinite conclusions of the pleader as to what it is claimed was done by the defendants, together with the alleged result of their acts.

It has been repeatedly and consistently held that allegations of what was done to effect an alleged conspiracy or combination are irrelevant and cannot be laid hold of to enlarge the necessary allegations of the indictment, and are of no avail.

Pettibone vs. U. S., 148 U. S. 197.

The reason for the rule arises out of the fact that the offense is complete when the combination is formed or agreed upon without the commission of an overt act, and that therefore the subsequent acts done in execution of the plan add nothing to the offense previously complete, but only furnish evidence of its existence. In this case how is it to be known whether the things alleged to have been done were in pursuance of the combination it is charged defendants engaged in when the combination itself is not described. The things they are alleged to have done may have related to something entirely foreign to the combination the grand jury or the pleader had in mind.

With the foregoing principles in mind, the allegations of the indictment of what was done will be examined. In setting out what is alleged was done no particular acts or species of acts are alleged, but the averments are embraced and blanketed in the indefinite

phrase, "by concerted action," which is merely the conclusion of the pleader. "Concerted action" imports no more than a number of related acts. Whether the acts in the mind of the pleader have the effect he thinks they do or whether they were committed in concert or in relation to each other cannot be determined by the court unless the acts themselves, or the character or type, or species thereof where numerous acts of the same character or type have been committeed, are clearly and definitely set out in the indictment. The court may differ from the pleader.

U. S. vs. Bopp, 230 Fed. 726.

All concert of action is not criminal any more than are all combinations, and unless the particular acts or the type, species or character of the acts are set out, it is impossible either for the court or the defendants to determine whether a violation of law is charged. All the authorities hold that persons may enter into many combinations for trade which are entirely innocent and which are wholly within the law.

Likewise, it must be conceded that innumerable acts done by persons engaged in the same line of trade may be done by agreement or by concert of action, which are not condemned by the statute. In fact, it is almost impossible for men engaged in a territory in the same line of trade to avoid more or less concert of action.

The conduct of any line of business demands more or less concert of action, association, cooperation and harmony for its proper conduct. The phrase "by concerted action" is not more definite than the word com-

bination previously used in the indictment, and no additional information was given the defendants or the court by the use thereof. The defendants were entitled to know from the indictment what acts and when and where and how and by whom committed, which the government claim constituted concert of action amounting to a violation of this criminal statute, and the law requires that the allegations of the indictment shall be so direct, definite and positive as to enable the court to determine whether or not the acts relied upon and the manner of their commission constitute concert of action and necessarily involve a continuing agreement to do them, and disclose a particularly defined combination in undue, direct, unreasonable and oppressive restraint of trade.

Engaging in a combination in undue and unreasonable restraint of trade and commerce is the gist of the offense. In every case the contemplated restraint must be undue and unreasonable.

In re Greene, 52 Fed. 111.

In the present indictment the allegation is—

> "Defendants have, by concerted action, carried on and conducted said business without any competition as to the localities in said states of Washington, Oregon and California * * * etc."

This allegation is clearly a conclusion of law, and if it is not it is so vague and indefinite that it has no value whatsoever in a criminal pleading. No duty or obligation to compete, or capacity therefor upon the part of the concerns named is shown, nor that any competition be-

tween them ever existed or could exist in the localities mentioned.

It is not alleged and appears only by the vaguest inference that all of the defendants and concerns involved could or did sell their respective products in the entire territory under consideration, or that they desired to do so, neither is it alleged that they or any of them would have sold therein but for the alleged "concerted action." Without stating how, or by whom, or by what means, it is alleged in effect that some of the companies were prevented from selling in some part of the territory. It is impossible to determine what acts concerted or otherwise could have prevented the Washington companies from selling cement in California. If the Washington companies desired to sell cement in California what possible concerted action could their officers and agents have entered into with the officers and agents of the California and Oregon companies by which they would have been prevented from selling in California, and what imaginable concert of action could the officers of the Southern California company engage in with the officers and agents of all the other companies, which would have prevented it from selling its product in either Oregon or Washington or both of them, if they so desired. Necessarily any such action would have been antagonistic to the desire which the indictment by implication asserts each of the defendants had.

"Prevented" as here used conveys the idea of the exertion of opposing and antagonistic force or action to overcome and which does overcome resistance exerted by the concerns upon which the concerted action acted, while

any "concerted action" used to include all the opposing actors, signifies harmony of action exerted to the same end by all concerned. Here we have a flat contradiction in terms in the same sentence—a fatal repugnancy. If what is alleged were otherwise sufficient, still it is impossible. "Concerted action" by "insiders" might prevent an "outsider" from doing something he otherwise would do, but "Concerted action" by "insiders" cannot prevent an "insider" from doing what he otherwise would do because immediately prevention commences, concert ceases. The one term signifies opposition, the other cooperation. The same persons cannot oppose each other and cooperate concerning the same matter and thing at the same time.

This fatal inconsistency is not removed by distinguishing between defendants and the concerns of which they are alleged to be officers or agents; here the mind of the agent is the mind of the concern; the act of the agent is the act of the concern; the resistance of the agent is the resistance of the concern and the cooperation of the agent is the cooperation of the concern. To deny this is to utterly destroy the indictment. If the control of the agent at this point does not become the mind of the concern, neither does it at any other point.

The only rational way by which the several companies could have been prevented from doing the things which the indictment asserts they were prevented from doing, was either by the conditions or laws of trade, or by an agreement or mutual understanding. If they were prevented by the conditions or laws of trade from doing the things they otherwise might have done, then the government has nothing to do with the situation.

If, however, they were prevented by mutual agreement or understanding, the government knows what that agreement or understanding was, and it is incumbent upon it to set it forth in the pleadings before the defendants are called upon to answer. In such case it would be the provisions of the agreement and the penalties of a breach thereof that would prevent, not the acts done under the agreement.

If it is contended that the indictment charges that the concerns in question refrained from selling cement elsewhere than in the State where manufactured, except that the Northern California companies made sales in Western Oregon, the answer is that the indictment does not so allege, but on the contrary asserts that by some undisclosed acts of some of the officers and agents of the respective concerns, whose ability to control them is not alleged, they were prevented from selling elsewhere than in the State where the cement was manufactured. The very character of the business, and of the product, renders it most likely that, the main business of a cement concern will be transacted close to the factory. Cement when considering its value or selling price, is heavier on a fixed ratio of price than almost any other product in commerce. Therefore it must find consumers near the producing point if the product is universally manufactured. The raw materials for cement are found in all parts of the United States. That being the case, the consumption of the greater portion of the product is reasonably near the place of manufacture, for freight rates preclude long hauls.

If an arrangement had in fact been made by which each State was to be supplied by its own domestic manu-

facturers, such an arrangement would not necessarily be an unreasonable one in itself. In fact, if the home producer could supply the home market it would be only an economic measure to prevent ruinous competiion from other States, whose manufacturers under normal conditions, could not successfully compete in the home market.

Whether a restraint of trade is unreasonable or undue depends upon the particular facts of each case, and the Court cannot determine whether the situation disclosed by those facts constitute a violation of the statute unless the facts are set forth in the indictment with reasonable particularity of time, place and circumstances.

It may be claimed that the allegation that the defendants "by concerted action" prevented the Oregon company and the Northern California companies from selling or consigning for sale their cement in Oregon, otherwise than upon arbitrary and non-competitive prices, fixed and agreed upon between them in advance of said sales and consignments for sales, is sufficiently definite in itself to save the indictment. This allegation is subject to the same objections of indefiniteness and uncertainty as the others by reason of its failure to disclose the particular acts, or character of acts, embraced in the phrase "by concerted action"; the inconsistency before pointed out is also present, and besides the allegations concerning prices are not direct and positive allegations, but made merely by way of recital which render them valueless for any purpose. The allegation is ambiguous for the reason that it cannot be determined therefrom whether the prices were fixed and agreed upon between all of the defendants, or any

of them, or between the Oregon and Northern California companies alone. It is entirely legal for parties to agree upon and provide for a uniformity of prices.

> "If the object of the contract had been merely to provide in good faith a uniformity of prices among the parties thereto to avoid unhealthy fluctuations in the market, or if the contract had contemplated a joint and mutual association between the parties for the common benefit in the nature of a partnership, and had simply fixed the prices at what they considered the business would bear, instead of combination between independent manufacturers and dealers, for the puprose of at least destroying all competition between themselves, then there might have been nothing in such an arrangement which the courts could denounce as pernicious and forbidden by law." Marr, J., Texas Standard Cotton Oil Co. vs. Adoue, 83 Tex. 650, 657, 19 S. W. 274, 276 (15 L. R. A. 598, 29 Am. St. Rep. 690.)
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> "The public has no right to unrestricted competition among all the persons engaged in any given business, nor to the benefit of prices produced by such competition. Meredith vs. Zinc & Iron Co., 55 N. J. Eq. 211, 221, 37 Atl. 539, per Pitney, V. C.; Joyce, Monopolies, Sec. 101. The manner in which the restriction is effected—assuming no illegal intent to have existed—is not material, whether by a combination, by the appointment of a joint agent, or, as in this case, by mere agreement." *U. S. vs. Whiting,* 212 Fed. 475.

Even though the allegation as to prices could be considered in aid of the indictment, yet it is seen that what is there set forth indirectly and by way of recital, is under the authorities, entirely legal and permissible.

The indictment terminates with the conclusion of the pleader, and, "so the grand jurors * * * do say that said defendants as aforesaid, etc. * * *" These words are merely the conclusions of law drawn from the preceding averments. If the averments are bad, the conclusions will not aid them. If they are good, and sufficiently describe the crime as the law requires by proper averments, formal concluding words are immaterial. *3d Chitty Criminal Law 737.*

It is thus seen that the concluding portion of the indictment adds nothing to what is previously set forth, and on its face it purports to be and is the mere conclusion drawn from the preceding averments. Nowhere in the preceding averments occurs any allegation or statement as to where the transactions, of which the indictment suggests the existence, or any of them, occurred, and it is submitted the conclusion of the pleader from the previous averments, that the alleged offense was committed in the State of Oregon, and within the jurisdiction of the trial court, is not a sufficient allegation of venue or jurisdiction, and nowhere else in the indictment does any allegation giving the court jurisdiction occur.

It is submitted that the first count of the indictment is wholly insufficient and that the demurrer should have been sustained, and the objections of these defendants to the introduction of any evidence in said cause upon the ground that the indictment did not state facts suf-

ficient to charge a crime of any kind or in violation of the law should likewise have been sustained.

Count Two of the indictment in effect charges the defendants monopolized trade and commerce; that is, created a monopoly by the transactions and in the manner and form set forth in Count One of the indictment. The demurrer attacked both counts upon substantially the same grounds. All of the essential elements of the combination in restraint of trade are necessary to a charge of monopoly and in addition thereto an indictment charging monopoly must show an acquisition of an exclusive right to, or the exclusive control of the trade in question, to the exclusion of others from that right and control by unlawful means.

There can be no monopoly which does not constitute an unreasonable restraint of trade, and therefore where it is contended that a monoply was effected by a combination, or engaging in a combination in restraint of trade, the indictment must at least meet the requirements of an indictment which charges engaging in a combination.

The indictment in the instant case has been already sufficiently shown in the discussion on the demurrer to Count One of the indictment, does not sufficiently allege a combination in restraint of trade, much less of monopolizing trade by means of such combination. Nothing appears in the indictment showing, or even indicating that defendants or any of them obtained any exclusive privilege which restrained others from the exercise of a right or liberty which they had before the alleged monopoly was secured. It appears from the indictment that each concern sold its own product as before, and

it does not appear that outsiders were effected in any manner whatsoever, or that any means to exclude others were employed. No engrossing or monopolizing or grasping the market, or restraint thereby is alleged. No allegation of acquisition of an exclusive right or the exclusion of others therefrom is charged or shown, and no unlawful means are disclosed by the indictment by which others were excluded or attempted to be excluded from the same traffic or business. In short, the indictment contains none of the essentials of a charge of monopolizing.

The combination, if any, was what has been designated as a loose combination. Concerning such combination the court in *Patterson vs. United States,* 222 Fed. 599, says:

> "The word 'monopolize' is used in this section in a legal and accurate sense. Its root idea is to exclude. To monopolize trade or commerce, or a part thereof, is to exclude persons therefrom. It is not, however, to exclude all persons. In the case of a perfect monopoly, which in experience has arisen only from a sovereign grant, the exclusion is of all persons but one, or perhaps, a group of persons. * * * But it is not such monopolizing that the section has in mind. It is monopolizing by the acts of individuals. * * * In the case of such a monopoly it would seem that it is not essential that all but the insiders be wholly excluded so that they have the whole field to themselves. It is sufficient that outsiders are substantially excluded, so that the insiders have to themselves approximately, or 'a largely pre-

ponderating part of,' the whole field. * * * It is possible for there to be a monopolizing by a combination of competitors. Such combinations have been divided into 'combinations by agreement,' or 'loose combinations' in which each member of the combination remains in the field, notwithstanding the combination, as in the case of Addyston Pipe & Steel Co. vs. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and 'combinations by fusion,' or 'corporate combinations,' as in the Standard Oil and Tobacco Cases. Possibly in cases of the former class, where there is no exclusion of outsiders, it is not proper to say that there is a monopolizing, as in that contingency there is no exclusion. At most it it may not be proper to say more than that there is a combination in restraint of trade. But in the latter case, notwithstanding there is no exclusion of outsiders, there is no reason for not characterizing what has been done as monopolizing, for in such case there is exclusion. The members of the combination are excluded for the benefit of the single corporation into which they are fused." *Patterson vs. U. S.*, 222 Fed. 619-620.

It will be noticed that the court in the last mentioned case states that loose combinations are formed by agreement. No agreement is charged in the indictment, only concerted action. If the acts constituting concerted action are sufficient to establish an agreement, the allegation of the indictment should have been that a designated agreement was entered into by the defendants, not that they committed acts in concert, and if the concerted

action shows anything less than an agreement, it does not constitute a loose or any kind of combination essential as the basis of a monopoly. Whether the acts referred to constitute concerted action or a combination or monopolizing cannot be determined by the court unless they are set forth in the indictment.

It follows that something more is required to constitute the offense of monopolizing under the statute than is required for engaging in a combination in restraint of trade. It has been conclusively shown that the indictment does not set forth facts sufficient to constitute a combination in restraint of trade. Hence it is insufficient as a charge of monopolizing. No grasping of the trade or exclusion of others therefrom by lawful or other means essential to a charge of monopolizing appears from the indictment. The charge is therefore wholly insufficient and the demurrer should have been sustained, and the objection of these defendants to the introduction of any evidence was properly taken and should have been allowed and sustained by the court.

ERRORS COMMITTED BY THE TRIAL COURT IN ADMITTING EVIDENCE WHICH WAS INCOMPETENT AND IRRELEVANT AND PREJUDICIAL TO THE RIGHTS OF EACH OF PLAINTIFFS IN ERROR.

It would serve no useful purpose and unduly lengthen the brief of plaintiffs in error to the extent of wearying both the Court and counsel, for us to discuss seriatim each and all of the errors committed by the trial court under this subheading. We shall therefore confine ourselves to taking some of the most glaring instances which in the opinion of counsel for plaintiffs in error were the most prejudicial and most seriously affected the jury in influencing them in arriving at an unjust verdict.

The first instance we desire to consider is the letter written to the Treasury Department bearing date February 2, 1915, written by Aberdeen Manufacturing Co., W. R. Lebo & Co., and T. V. Darragh Co.

The letter in question, Plaintiff's exhibit No. 40, was offered in evidence over the objection of counsel for plaintiffs in error and was submitted under the instructions of the court only for the purpose of showing that a complaint had been made to the Government. Counsel for the Government then decided to read the letter to the jury and again counsel for plaintiffs in error objected on the ground that the contents of the letter would not be evidence. The Court advised the jury that the letter itself was not evidence to be considered by them of any facts stated in it, and an instruction was given by the Court repeating this advice. Notwithstanding the advice of the Court to the jury that the statements contained in the letter were not evidence of any fact therein stated, the Court did allow the prosecution to read such letter in its entirety to the jury. The letter itself, as will be noticed, is a complaint by the signers to the Treasury

Department, reporting what the signers claim to be a predicament they find themselves in, in that, due to a combination which the letter alleges to have been made to control the sale of cement in Hoquiam, Washington, the signers were to be deprived of their business. The letter then states that the combination was apparently entered into by the Superior Portland Cement Company, the Washington Portland Cement Co. and the Olympic Portland Cement Company of the State of Washington, and by the Pacific Portland Cement Company and the Henry Cowell Lime & Cement Company of California, and one F. G. Foster, a local dealer in the city of Hoquiam, Washington, and alleges that prior to such combination the city of Hoquiam and vicinity had been supplied by all of the signers to such letter of complaint, but that owing to the combination they were deprived of handling cement, and that after the alleged combination had gone into effect, the price was raised 30c per barrel to the consumer; that the parties to the combination were selling cement at a lower price in other localities, but owing to the combination of which the letter complained, they were asking arbitrary prices in Hoquiam.

We do not know of any rule of evidence by which the letter was admissible for any purpose whatsoever. It was a letter written by third persons, not in any way connected with appellants in error, and contained statements which were in no way connected with appellants in error and such letter was written prior to the time appellants in error began the manufacture of cement. If it were not evidence of any of the facts stated therein, it was not evidence at all. The rule that communications

of this character are not admissible in evidence is such elementary law that we hardly deem a citation necessary. We call the Court's attention however to the case of *Consolidated Grocery Co. vs. Hammond,* 175 Fed. 641; 645, wherein, in reference to a letter written by a third person which the trial court allowed to be introduced, the appellate court by Shelby, Judge, says:

> "The letter having been written by a third person, without the knowledge of the defendants and without their subsequent sanction or approval, seems to us to be hearsay testimony so far as the defendants are concerned, and for that reason inadmissible against them."

The parties before the Court in the instant case are charged with a breach of what is commonly termed the Anti-trust Acts, and no proof is needed to this Court that the public is all too ready to believe that all manufacturers in industry requiring large amounts of capital investment, are apt to, or willing to become parties to trust agreements with similar manufacturers; that there is ever present a union of capital in order to gouge the public purse, and the farmers, such as composed the jury in the instant case were no exception to the class of citizens above defined as the public. This letter, which makes direct charges and states the near results, attempts to state and show the results of a combination existing between cement manufacturers, necessarily had a decided influence on the minds of the jury in the instant case and necessarily biased and prejudiced the jurors against the defendants on trial, and although

the Court sought to exclude in its charge the evil of allowing the letter to be read, the harm was already done, the impression was created in the minds of the jurors—an impression not to be eradicated or overcome by the charge of the Court.

The instruction of the Court to the jury to disregard the alleged statements of fact in the letter was no more effective than would be the Court's order to the wind to cease blowing, or the waves to stop rolling in on the seashore. The harm was done, the impression created, and the command of the Court could no more eradicate the impression created in the minds of the jurors from the reading of such letter than could a child who has driven a nail in a piece of polished wood or furniture, cure the same by withdrawing the nail and stuffing the hole with breadcrumbs or putty. The wound or scar is there. The words of the Court in its instruction to disregard the harmful effect of the letter could no more erase the prejudice than a child could cure the wound or scar in the illustration given. The evidence was either proper or improper in the first instance. If improper and the trial court admits its impropriety by instructing the jury to disregard it, then the harm should have been cured by a new trial awarded by the lower court, or should be corrected by this Court.

It may be urged that the admission of this letter and the reading of the same should not cause a reversal because there was other legal evidence to support the verdict. In this connection we can only refer to the language of Judge Shelby in the *Consolidated Grocer Association* case, last above quoted, 175 Fed. 641-646, wherein the Court says:

"It is of course a sound principle that a judgment should not be reversed when the error complained of worked no injury. Referring to the application of this rule, in Smith vs. Shoemaker, *supra,* page 639, of 17 Wall. (21 L. Ed. 717), the Court said—'It must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party. The case must be such that this Court is not called on to decide upon the preponderance of evidence that the verdict was right, notwithstanding the error complained of.' The letter in question here bears so upon the issues joined that we cannot in view of other evidence in the record say that it was not injurious to defendants."

Another instance similar in general scope to the admission of the letter to the Treasury Department, and the reading of the same to the jury, was the evidence regarding the action of the Washington and Northern California Cement companies, or some of these companies, in opposing the proposed action of the Spokane, Portland & Seattle Railway Company in putting in a rate upon cement from the Irwin plant near Spokane to Portland of 13½c, which rate was not to apply to intermediate points, nor to apply in the opposite direction. We know of no reasons why persons engaging in any business may not combine to prevent any action of common carriers, which in their judgment may be prejudicial to their business and this principle is recognized in the general charge of the Court to the jury. Therefore, if the action of the several Washington companies and some of the Northern California companies

in using every means possible to prevent such railway company from establishing what in the judgment of such Washington and Northern California companies was an unjust and discriminatory rate, we cannot see upon what principle such evidence could be admitted to establish an unlawful agreement, combination or conspiracy between the cement manufacturers. In other words evidence of the combination between cement manufacturers to do a lawful act cannot constitute evidence of an unlawful combination or a combination to do an unlawful act. The evidence referred to was the evidence of C. F. Swigert referred to in exception 39, who testified that Portland quotations for cement in connection with the Interstate Bridge job were from $1.75 to $1.90 but that he secured a quotation from the International Cement Co. of Spokane, or Irwin, at $1.65 delivered in Portland if the freight rate of 13½c per hundred pounds could be obtained from the railroad; that Mr. Coats of the Washington Cement Company advised him that he would protect the International price if he, Swigert, would not insist upon the rate going into effect; that the orders were thereafter given to the International in the first instance, but the cement was furnished by the Western Washington or the Northern California companies; also the evidence of W. D. Swinner, Traffic Manager of the Spokane, Portland & Seattle Railway Company, exception 74, wherein Mr. Skinner testified that the former rate was 25c per hundred pounds, between Irwin or Spokane and Portland; that he had agreed to put in a rate of 13½c for the Interstate Bridge job; that objection was made by Eden and Coats of the Western Washington plants to such rate going into

effect, and thereafter agreement had between the cement companies and cement for this job furnished by Western Washington and California cement companies, and Government Exhibits 38, 41, and 75, which refer to the contract between Pacific Bridge Co., and Superior Portland Cement Co., letters between the Superior Portland Cement Co. and its Vancouver agent, and telegrams passing between Muhs of the Northern California Co. and J. C. Eden and Coats of the Western Washington Co., and J. G. Woodworth, vice-president of the Northern Pacific Railway Company and Eden relative to the rate in question and the contract for cement for the Interstate Bridge. These letters, telegrams and the evidence submitted showed clearly that the Western Washington Cement plants and the Northern California plants were working in harmony to prevent this rate going into effect, and to prevent such rate going into effect they were willing to and subsequently did, sell cement to the Pacific Bridge Co. at less than the then prevailing market price in the city of Portland. It was perfectly lawful for these parties to get together in connection with this matter. A combination to do a lawful act—something the parties had a right to do. It was evidence of previous accommodations and actions prior to the entry of the Oregon Portland Cement Company, the plant officered by plaintiffs in error, into the manufacture of cement. Such evidence submitted to a trained legal mind such as that of the trial court or to this Court could have no possible harm or injurious effect with reference to the rights of plaintiffs in error. The case however was not to be tried by trained legal minds. The case was tried at a time when prices were

rising—when the public purse and mind were at the breaking point with reference to price advances, and willing to take any action to sotp the steady advance of prices, which was far in excess of the rise in wages or the returns from farm products. At a time when the increased cost of any public work to be paid for by taxation would necessarily increase taxes, which were already advancing by leaps and bounds, not only due to the advance cost in local administration, but also to the increased taxes imposed by the Federal Government for war needs. Therefore, evidence of this character had a strong and decisive tendency in biasing the minds of the jurors and causing them to be not only willing but anxious to penalize any person which in any manner they could legally accuse of having any part in such advance prices, and although the action of the cement company was lawful, evidence of something they had a right to do, and the Court so instructed the jury in its final charge, the Court did admit such evidence in the case attempting to prove these plaintiffs in error guilty of a crime, and the jurors naturally concluded that such evidence was proper and that they had a right to convict thereon, or otherwise the Court would have excluded such testimony from the trial. It is true that in this instance, as in the instance in connection with the letter to the Treasury Department, the Court by its instructions sought to protect the rights of plaintiffs in error by instructions, but as previously stated, the harm was already done, the wound was there, and words could not efface it. Or to use the words of Watkins, Judge, in the case of *Stewart vs. Newby*, 266 Fed. 287-295:

> "Whether the effect of the evidence thus improperly introduced may be subsequently removed by its exclusion and an instruction to disregard it, depends on the character of the evidence. This Court must take cognizance of the general recognition among the members of the bar, as well as by the Courts of the harmful effects upon minds of jurors of such testimony as was here sought to be introduced. The only purpose for which such evidence is presented is to prejudice the jury and the poison is of such character that once being injected into the mind, it is difficult of eradication."

We admit that the general rule is that where the Court has erroneously admitted evidence during the trial, the error of its admission is cured by subsequent withdrawal before the closing of the trial, or by a clear peremptory instruction to the jury to disregard it, but as was said by the Court in the case of *Maytag vs. Cummings,* 260 Fed. 74-82, wherein Judge Sanborn after stating the general rule then comments:

> "But there is an exception to this rule. It is that, where the appellate court perceives from an examination of the record that the inadmissible evidence made such a strong impression upon the minds of the jury that its subsequent withdrawal or the instructions to disregard it probably failed to eradicate the injurious effect of it from the minds of the jury, there the defeated party did not have a fair trial of his case and a new trial should be granted."

The quotation above given was by Judge Sanborn in a civil action. The instant case is a criminal action

and one tried at a time when, as previously stated, the public mind was in such condition that it was hard for laymen to grant a fair trial to persons accused of a crime of the character of the one under examination under any circumstances. Therefore, could it be said by the trial court, or can it be said by this court, that the two instances above cited, that of the letter to the Treasury Department, which was read, making a positive and direct charge by parties not before the Court, not subject to cross-examination, a statement to which plaintiffs in error had nothing whatsoever to do, and the evidence relating to a combination of cement manufacturers to do a lawful act, which might or might not have a tendency to raise taxes, but which to the public mind would apparently cause an increase in the cost of a public project and a consequent raise in taxes, did not have a most decided effect upon the result of the trial of plaintiffs in error, or could it then be said, or can it now be said that the above evidence alone was not the controlling evidence upon which the jury decided the guilt or innocense of plaintiffs in error. There was no other evidence before the Court except of Aman Moore, who was discredited and apparently apologized for by the prosecuting attorney, and evidence that cement, a commodity like sugar, whether manufactured by Washington, Oregon, California, or any other company, possessing the same qualities and therefore necessarily sold at the same price, was sold at the same price by the Washington, Oregon and California companies.

Another class of evidence which comes under this general head includes various and sundry letters passing between the several Washington companies and per-

sons doing business in the State of Washington only. It covers letters written by several Washington companies to F. T. Crow & Co. of Seattle, to F. T. Crow & Co. of Tacoma, and letters written by Wylie of Aberdeen, letters written by Foster of Hoquiam, letters written by Bennett of Vancouver, and letters written by these several parties to the Washington cement makers. The Court in which this case was tried had only to do with violations of the Sherman Anti-Trust Act, an Act to protect interstate and not intrastate commerce or trade. If the attempted combination between the Washington cement manufacturers relating to business within the State of Washington only, was against the law, it was against the law of Washington only, and not against the Act of Congress, and any evidence of any combination or agreement between the Washington companies only, and relating to business within the State of Washington, whether legal or illegal in such State, was clearly incompetent to establish a violation of the Act of Congress, which relates solely and alone to interstate law.

Another class of evidence of the same general character are the letters relating to promotion work. It is admitted that cement companies have a right to combine for any legal purpose, and that the promotion of the use of the product of their mills is a lawful purpose. The National Portland Cement Association was an organization of cement manufacturers throughout the United States, formed for the purpose of fostering the use of cement throughout the country. This Association had nothing in the world to do with the business of any cement manufacturer; it did not pretend to regulate where

each manufacturer could sell the product of his mills, or at what prices should he sell the same. It was a voluntary association formed for promoting their own interest and as they viewed it, the common interest of all persons engaged in building. In this class may be considered letters passing between Eden and George and other letters, Government Exhibits 74, 76, 77 and 89.

The correspondence between George and Leonardt, Government Exhibit 105, and the letter from Henshaw to Butchart, Government Exhibit 89, we submit were both clearly incompetent. Neither of these letters tend to establish any agreement, combination, or conspiracy. The first of these letters merely expresses the views of the writer in regard to how manufacturers of cement should regard one another, and what action they should take toward one another. There is not a single statement contained in this correspondence which tends to show that either of the parties had entered into or intended to enter into any combination in restraint of interstate commerce. The second of these letters from Henshaw to Butchart makes no reference to any combination or conspiracy in restraint of interstate commerce. It contains a protest against the installing of a new cement plant in the territory adjacent to the Riverside plant, and asks the friendly assistance of Butchart in preventing this installation. The other refers to a scheme which Henshaw had and which he thought would probably put all cement companies out of business. He came to Butchart as his friend of long-standing explaining the character of this proposed enterprise, and what its effect, if successful, would be upon the cement industry on the coast. It was written after

the Riverside Company had withdrawn from Oregon and Washington. It makes no references to the causes which led up to this withdrawal. There is nothing in the letter from which any inference can be drawn that either the writer or the person to whom the letter was written had at any time been in any combination or conspiracy in restraint of interstate commerce or trade.

The trial court permitted the Government to introduce evidence to show that notwithstanding the fact the Oregon Portland Cement Company sold its product entirely to dealers, giving them special terms and really at lower prices than other cement companies charged for cement, the consumers paid the same price. This evidence was simply based upon the language of the indictment, but we submit this part of the indictment does not charge any violation of the law, as more fully shown in the argument previously submitted relating particularly to the indictment. No attempt was made to show that the Oregon Portland Cement Company undertook to fix a price at which dealers should sell cement, nor the territory in which the cement should be marketed, nor that these plaintiffs in error as officers of said companies undertook to fix such price or market. If consumers were deprived of the benefit of competition and were compelled to pay arbitrary prices for cement, the defendants on trial had nothing to do with this result. If the fact were true that the consumer paid the arbitrary price, it would have been a combination between the dealers and cement companies, other than the Oregon Portland Cement Co., a combination with which the Oregon Portland Cement Co., and the defendants on trial had nothing to do.

ERRORS COMMITTED BY THE TRIAL COURT IN EXCLUDING EVIDENCE WHICH WAS COMPETENT AND RELEVANT AND HAD A TENDENCY TO EXPLAIN THE ACTIONS AND CONDUCT OF EACH OF PLAINTIFFS IN ERROR.

Defendants offered in evidence when Aman Moore was on the stand, letter written by Wirt Minor to Aman Moore dated July 25, 1916, defendant's identification No. 12, and letter written by Aman Moore to Mr. Minor dated August 29, 1916, defendant's identification No. 13. These two papers were excluded by the Court upon the ground that they had nothing to do with the case. Other papers of the same kind are the telegrams dated July 27, 1916, addressed to R. P. Butchart, signed by C. Boettcher, R. J. Morse and Possett, and the conversation between H. A. Ross, Clark M. Moore and Wirt Minor in relation to matters set forth in these telegrams. The attention of Aman Moore was called to this conference and telegrams relating to the matters which were discussed and it was shown one of the telegrams was discussed at that conference. This evidence was offered for the purpose of impeaching Aman Moore and the defendants expected to show that at that time Aman Moore, notwithstanding the charges he had made against Butchart and Clark M. Moore, had agreed that the sales department should remain in charge of Clark

M. Moore, and that Butchart's powers as president should not be interfered with.

We submit that this testimony tends strongly to impeach the statements made by Aman Moore and which probably constitute the entire evidence in favor of the Government against these defendants. It impunes the good faith of Aman Moore and tends to show conclusively that Aman Moore was satisfied with the manner in which Clark M. Moore was conducting the sales department of the Oregon Portland Cement Company, at that time, and that the so-called facts related in his testimony were after-thoughts engendered from the bitterness created in his mind by the refusal of the stockholders and managers to allow his rule or ruin policy. This evidence was particularly important as there is no testimony that Clark M. Moore ever made an agreement or entered into any combination or conspiracy as charged in the indictment and the entire case rests on the manner in which he conducted his department, and this evidence tends strongly to show that no change had been made in the manner in which the sales department was conducted. Identifications 12 and 13 further impune the good faith of the witness Moore, for by these identifications he was called upon by the attorney for the company, who was one of the directors of the company, to produce evidence which he had to sustain the charges which he had made in his complaint of June 9, 1916.

ERRORS COMMITTED BY THE TRIAL COURT IN ITS CHARGE TO THE JURY.

Indictment in Count Two charges plaintiffs in error with monopolizing Interstate Trade and Commerce in the district of Oregon, and does not charge plaintiffs in error with monopolizing or attempting to monopolize Interstate Trade or Commerce either in California or Washington.

The charge of the Trial Court, however, was not so limited. We quote:

> "Now the second count of the indictment as I have already said to you, charges the defendants with monopolizing the trade or commerce between the States in violation of Section 2 of the Act, which provides that all persons who shall monopolize or attempt to monopolize, or combine with any person or persons to monopolize any part of the trade or commerce of the several states, shall be guilty of a crime. To constitute the offense of monopoly under the Act, it is necessary to acquire exclusive right to such commerce by means which will prevent others from engaging therein."

The reference in the Trial Court's charge is to the part of the charge which precedes, and is in the following language:

> "The second count charges the same parties by means of the same arrangement and combination with monopolizing the trade in cement in these several States."

The several States referred to are Oregon, Washington and California. It appears, therefore, that under

the charge of the Trial Court upon the second count of the indictment, the jury was instructed to try the defendants upon the charge of monopolizing trade in cement in Oregon, Washington, and California, whereas the second count limits the charge of monopoly to the State and district of Oregon.

If, therefore, the jury should have found from the evidence that the defendants on trial agreed that the California companies might have a monopoly of the cement business in the State of California, they could find the defendants guilty upon the second count, though the indictment charges them only with the monopoly of the cement business in the State and district of Oregon.

In the charge of the Trial Court, the Court stated that it is not charged that by the alleged agreement the Oregon companies' territory was limited to points north of Drain or Roseburg, or the Deschutes or the town of Umatilla on the east, and that the geographical points above mentioned were material in the case only as bearing upon the creditability of witness Aman Moore, who testified to an alleged conversation he had with Mr. Butchart, in reference to the division of territory, and that if the jury should find, from consideration of the whole case, that the defendants on trial became parties to an agreement excluding the Washington companies from Oregon, and the Oregon companies from Washington, and restraining or limiting competition in Oregon as between the Oregon and California companies, it would be justified in finding against the defendants.

We contend that so far as the defendant, Clark M. Moore is concerned, there is absolutely no evidence tending to show that at any time he knew of any alleged

combination or agreement between the California and Washington companies, and the Oregon company, or any of them.

Aman Moore does not testify that Clark M. Moore entered into such agreement, and no other witness does. On the contrary, Aman Moore testified that Clark M. Moore stated he would carry out no agreement made by Butchart or anyone else if such agreement was made which was in violation of the law, but would sell the product of the Oregon Cement Company wherever the freight rates would carry him.

Now Aman Moore testified he did not tell Clark M. Moore what Mr. Butchart told him—in other words, he testifies he told Clark M. Moore that the agreement was, so far as Oregon was concerned, limited to the geographical points defined by the Trial Court.

Clark M. Moore could only be convicted, as the Trial Court charged the jury, upon evidence showing that he became a party to the agreement or combination. He therefore could not become a party to any agreement or combination which was not limited by the geographical points defined by the Trial Court, and he could not be convicted upon the indictment unless it were shown that he became a party to the agreement, and that this agreement was limited to the geographical points defined by the Trial Court.

Again, in order to find the defendants guilty, or either of them guilty, it was necessary for the Government to show by evidence to the jury beyond a reasonable doubt, that Butchart and Clark M. Moore became parties to this agreement, which was alleged to have been

entered into in 1914 between the Washington companies and the California companies.

No effort was made to show that Butchart or Clark M. Moore were parties to this agreement at the time it was alleged it was entered into. All the testimony of the Government is to the effect that the agreement, so far as the California companies withdrawing from Washington is concerned, was made in 1913, or early in 1914, and so far as the Washington companies withdrawing from Oregon is concerned, was made in June or July, 1914, the Washington companies at that time being permitted to sell in Oregon north of Salem, and about the end of 1915 or first part of 1916, that the Washington companies would not sell in Oregon at all.

There is not a single particle of evidence tending to show that either of the defendants on trial had anything to do with the agreement or combination which is alleged to have been made in 1913 or 1914.

Every witness on behalf of the Government who testified upon this subject states that the California companies practically gave up business in Washington early in 1914, or prior to that time, and that at or about that time the Washington companies agreed to do no business in California, and none in Oregon south of Salem.

The trial court charged the jury that the relationship of Mr. Butchart to the Portland Cement Company prior to the formation of the Oregon Portland Cement Company, and his activities in connection with the plant at Oswego under both corporations might be taken into consideration.

It is admitted that Mr. Butchart was not an officer of the Portland Cement Company, nor a director in said corporation. There is no evidence that he had anything to do with the policy of that corporation.

The only evidence relating to this matter is found in the letters between Aman Moore, the President of the Portland Cement Company, and Mr. Butchart, written in 1914, and in the spring and summer of 1915. These letters are Exhibits 82, 83, 84, 85 and 86. There is no controversy in regard to the date of the formation of the Oregon Portland Cement Company. It was not formed until August, 1915.

It is conceded that until certain conditions were complied with, conditions created by a Mr. Boettcher, and until Mr. Boettcher should become satisfied with the situation and pay for his stock, the Oregon Portland Cement Company could have no existence, and it was contemplated in the event that the conditions should not be fulfilled, that the Portland Cement Company should liquidate. Its charter had already been forfeited for the failure to pay its license fees.

We submit that these letters do not warrant or form any basis for this charge. The first of such letters is dated September 4, 1914. It suggests that all subscribers will be glad to let matters stand until the war is over. In this letter Mr. Butchart enclosed a letter which he had written to Boettcher, which Boettcher letter reviews conditions, and expresses the opinion of the writer that the advent of the plant at Oswego would not affect the market unless such plant should cut prices.

The second letter is dated May 14, 1915, in which Butchart suggests to Aman Moore that when the Os-

wego plant should enter the market, its attitude should be to leave matters as they were, and say nothing of the peculiar advantage of the Oswego plant, and nothing derogatory of other manufacturers—in other words, the suggestions in such letter are in line with the Trial Court's charge wherein the Court said—

> "A manufacturer may offer his product for sale at the same price and on the same terms, and in the same territory as competitors, and not be guilty of a violation of this staute."

and particularly with that portion of the trial court's charge wherein the court says:

> "If, however, at the time the Oregon Company was ready to market its products it found an established price for cement made by its competitors, it had a right, without violating the law, to conform thereto and sell its product at the same price or to confine its operations to any certain or particular territory."

The next letter is dated May 16, 1915. This letter relates entirely to the Columbia Highway contract, and suggests that before Aman Moore should make a price to a contractor he should discuss the subject of price with Mr. Coats. The contract referred to was to be performed, in part at least, in 1915, and it was known when such letter was written that the Oswego plant could not supply cement for that year from its plant, but must obtain such cement from some other maker, and it seemingly was contemplated that the Company represented by Mr. Coats should supply the cement. There-

fore, it was proper, before making a price, to consult with the representative of the Company who was to supply the article.

This statement applies with equal force to the letter of May 22, 1915. The last of these letters is dated June 14, 1915, and relates entirely to the Columbia Highway contract. In none of these letters is there any intimation or statement that Mr. Butchart was in any respect active in the management or control of the Oswego plant, or taking any particular interest therein except to express his willingness to deposit his check to cover his subscription provided he should be allowed interest on the amount pending the time the old company should be reorganized.

We submit that there is no evidence showing that Mr. Butchart did anything in 1914 or 1915 toward determining the policy to be pursued by the Oswego plant when it should come into operation, but as a possible subscriber and stockholder he contented himself with generally expressing his views in letters of advice to Mr. Aman Moore, the President of the Portland Cement Company. Therefore, there was no evidence upon which the instruction under discussion could possibly rest. Such instruction assumes a state of facts not established by the evidence. The portion of the charge quoted in connection with the letters were correct statements of the law, but we cannot say whether the jury were guided by such statements, or listened more particularly to and were guided by the erroneous instruction now under discussion. The letters in evidence were certainly entirely consistent with the innocence of the defendants.

A further instruction was given by the Trial Court in regard to the last letters commented upon. This latter instruction refers to the letters just commented upon, and also to those passing between Mr. Butchart and Mr. Aman Moore subsequent to the formation of the Oregon Portland Cement Company, and prior to the date on which Clark M. Moore became sales manager of the company. It covers Exhibits 82 to 96, both inclusive.

The evidence shows, without contradiction, that Mr. Butchart was made President and Director of the Oregon Portland Cement Company on December 21, 1915. The letters show that he was not in Portland between December 23, 1915, and March 31, 1916, and that he did not return to Portland before April 10th or 11th, 1916. The letters show that the first suggestion in regard to having some understanding with competitors was made by Aman Moore in his letter of December 23, 1915, in which he suggests that the general policies of the company in handling sales should be outlined and arranged by Mr. Butchart so far as dealings with competitors are concerned.

The answer to this letter, dated December 29, 1915, clearly shows that Butchart had not had any agreement or understanding with any competitors. He gives his opinion that no prices should be quoted until this matter had been gone into with the California and Washington makers; that the price should be the same in Portland as in Seattle, San Francisco and Tacoma, and that it will be difficult for the Oregon company to secure the Seattle, San Francisco, and Tacoma prices unless it were permitted to name the price for Oregon, and that some

understanding should be arrived at whereby the Oregon company might be assured of disposing of the output of the one kiln plant.

He further suggests that this would require careful handling, but that he was in hopes it could be done; that he would meet some of the Washington makers and impress upon them the views of himself and Aman Moore, and that he thought it best that Mr. Aman Moore should leave these matters in his hands.

This correspondence shows conclusively that at the time the letter was written Mr. Butchart had done nothing to have any understanding with any cement manufacturer, and that he did not wish Aman Moore to have any understanding with any cement manufacturers.

The correspondence up to this point shows that no agreement or combination or conspiracy had been entered into, or attempted by Mr. Butchart.

On December 31st, 1915, Aman Moore wrote a letter to Mr. Butchart, acknowledging the letter of Mr. Butchart of December 29th, 1915, in which he says he believes that Butchart, with his acquaintance and friendship with the Washington and California cement makers will be able to establish a market for the Oregon product without cutting prices, and suggests that he take the matter up with Coats.

The next of these letters is February 11th, 1916, addressed to Mr. Butchart, and written by Mr. Aman Moore, but this letter contains no suggestion in regard to any action to be taken by Mr. Butchart in connection with other cement makers. If such letter was answered, the answer is not in evidence, and as the Government

was furnished with all of Mr. Aman Moore's files, we must therefore assume that no answer was made to this letter.

Aman Moore wrote another letter to Mr. Butchart dated February 12th, 1916. This letter was acknowledged and answered on February 15th, 1916—See Exhibit 92. From the answer it would appear that the letter related entirely to the sale by Aman Moore of a part of his stock, and that the only parties to whom he thought the same could be sold were Henshaw and Coats.

The next letter by Butchart to Aman Moore was written February 21st, 1916—Exhibit 93. It acknowledges the letter written by Aman Moore to Mr. Butchart, dated February 17th, 1916, but this letter is not in evidence, and we can only judge of its contents from the answer. Seemingly it related entirely to a suggestion that Mr. Butchart should see the Purchasing Agent of the Southern Pacific with view to selling the Southern Pacific its cement requirements in Oregon; and that it was contemplated the Southern Pacific would pay the Oregon Company the same price for cement in Oregon which it paid the California Companies for cement in California.

The next letter is dated March 2nd, 1916—Exhibit 94, written by Mr. Butchart to Aman Moore. It acknowledges the letter of Aman Moore dated February 28th, 1916. It does not contain anything which might tend to show that any combination or agreement or conspiracy was entered into or contemplated. On the contrary the letter states that the Company was not ready to make quotations to anyone.

The next letter is from Aman Moore to Mr. Butchart, dated March 6th, 1916, Exhibit 95. This letter also relates to contemplated sale of cement to the Southern Pacific, and tells what the writer has done with relation to sales. It conclusively appears from this letter that on March 6th, 1916, nothing had been done by Butchart or by Aman Moore toward an agreement, understanding, combination or conspiracy with other cement makers, for in this letter Aman Moore advises he had received orders from the best dealer in each town, including Roseburg, Dallas, Salem, Pendleton, and others, with the understanding that the price should meet competition, and that with this understanding these dealers were to drop other companies and represent the Oregon Company alone. This letter was answered by Butchart by letter dated March 14th, 1916—Exhibit 96, in which he states he has seen the Southern Pacific Purchasing Agent and says:

> "Some of the Washington makers will be here Friday, and I expect we will have something definite next week. In the meantime it would be just as well to forego any expenditures in the way you suggest."

The expenditures referred to were in relation to the letter of Aman Moore of March 6th, 1916, wherein Aman Moore had suggested printing a pamphlet and canvassing the territory.

There was nothing in any of the letters in question which tended to show any agreement or combination had been made, or any conspiracy had been entered into by Mr. Butchart with the California or Washington cement makers of any kind whatever, and no inference

that such combination, agreement or conspiracy existed could be drawn from any of such letters.

As a matter of fact, the letters negatived the idea that there was any agreement, combination or conspiracy, and therefore could not be regarded as evidence against Mr. Butchart. The letters were entirely consistent with his innocence, and repeatedly throughout the charge of the trial court, the Court told the jury that unless there was some agreement or combination made with one or more of the cement manufacturers by Mr. Butchart, or by Clark M. Moore, neither of these parties could be found guilty; that such an agreement might be found from their actions—that is to say, the manner in which the business was conducted—from what was done, and not what was contemplated.

An illegal agreement, combination or conspiracy, therefore, could not be proven or established by these letters, nor could it be inferred from such letters, for they positively negatived any such understanding or conclusion.

We submit, therefore, that it was error on the part of the trial court to say to the jury that these letters were evidence against Mr. Butchart. They were not evidence against Clark M. Moore, for he was not Sales Manager, had nothing to do with, and no interest in the Oregon Company, and was not in a position to make any agreement, or to act on its behalf.

If Clark M. Moore was to be found guilty, he must be found guilty upon what occurred after he became Sales Manager from his actions, and from his actions alone. The instructions of the Court, however, left the jury the power to predicate guilt upon the letters alone.

The jury indeed was instructed by the trial court that they might find the defendant Butchart guilty upon the letters alone without any proof that he actually entered into any agreement or combination, or conspired with the other defendants, or any of them.

The statute does not make it a crime for a party to consider the advisability of entering into an unlawful agreement, combination or conspiracy in restraint of interstate trade or commerce. He must actually enter into such combination, or make such agreement and become a party to such conspiracy before he may be said to violate the law, and none of these letters indicate that Mr. Butchart did enter into any agreement or combination, or into any conspiracy with anyone in violation of the Sherman Anti-Trust Law.

If the letters are given full force and effect, and the worst possible construction placed upon them, all that can be said for such letters, viewed in this light, would be that Butchart was contemplating the advisability of entering into such agreement, and did not wish Aman Moore to compromise him, or compromise the Oregon Portland Cement Company by doing anything to bring about such an agreement, combination or conspiracy, or to enter into any such agreement, combination or conspiracy.

The indictment charges all the defendants with making an agreement, combination, or forming a conspiracy in violation of the Sherman Anti-Trust Law, and that such agreement was made in 1914 prior to the date of any of the letters in question.

If the agreement was formed between the California and Washington Companies, it was formed in 1914, and

there is no evidence to connect either Mr. Butchart or Clark M. Moore with the violation of such agreement, and these defendants could only be convicted if it were shown that after the agreement, combination or conspiracy was formed or entered into by other defendants, Mr. Butchart and Clark M. Moore, or one or the other of them became parties to it.

The real question in the case was whether or not they did become parties to such agreement, combination or conspiracy, and we therefore submit that the letters were not properly in evidence, and that the instructions in relation thereto were erroneous, and prejudicial to these defendants.

In the charge to the jury the trial court told the jury that if it should find that Mr. Butchart had failed to deny or explain acts of an incriminating nature the evidence of the prosecution tended to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the circumstances in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have denied or explained the incriminating evidence, if there is any against him, he would have done so.

The trial court further stated that Mr. Butchart while on the stand testified that he did not make certain statements attributed to him by Aman Moore, but said nothing about the letters written by him to Aman Moore, nor did he say anything about the meeting in San Francisco referred to in these letters, or offer to explain any of the letters or any of the statements contained therein, and that the jury had a right to take this omission of the defendant Butchart into consideration.

This instruction was based upon the language of the Supreme Court in *Caminetti v. U. S.*, 242 U. S. 470. This was a White Slave case. It appears that the girls had given evidence incriminating the defense. Evidence of matters which they had testified were within the defendant's knowledge, and the opinion of the court is clearly based upon this condition.

In the Caminetti case, on pages 494 and 495, the Court says:

> "There is a difference of opinion expressed in the cases upon this subject, the Circuit Court of Appeals in the Eighth Circuit holding a contrary view, as also did the (454) Circuit Court of Appeals in the First Circuit."
>
> *Balliet v. U. S.*, 64 C. C. A. 201, 129 Fed. 689; *Myrick v. U. S.*, 134 C. C. A. 619, 219 Fed. 1.

We think that the better reasoning supports the view sustained in the Court of Appeals in this case, which is that where the accused takes the stand in his own behalf and voluntary testifies for himself (Act of March 16th, 1878, 20 Stat. Atl. 30, Chap. 37, Comp. Stat. 1913, Sec. 1465), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and evidence already in evidence, in which he participated, and concerning which he is fully informed, without suggesting his silence to the inferences to be naturally drawn from it.

The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls when he took the witness stand

in his own behalf. He voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of these things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so without the fair inference which would naturally spring from his speaking only of those things which would exculpate him, and refraining to speak upon matters within his knowledge which might incriminate him.

The instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence, must be read in connection with the statement made in this part of the charge which clearly shows that the Court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances and intent with which that trip was taken; and the jury was told that it had a right to take into consideration that omission.

The court did not put upon the defendant the burden (495) of explaining every inculpatory fact shown or claimed to be established by the prosecution.

The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge, and as to events in which he was an active participant, and fully able to speak when he voluntarily took the stand in his own behalf.

It is clear from this language that the instruction was held to be correct only because it appeared that evi-

dence had been drawn in the case tending to show the guilt of the defendants, and evidence of facts of which the defendants were cognizant, and of which they had full knowledge, and that without such evidence the instruction would have been erroneous.

It is a familiar principle that a defendant is not compelled to meet allegations in the complaint which are not supported by any evidence. He must only meet the evidence which is introduced. It therefore behooves us to ascertain whethere there was any evidence introduced which the defendant Butchart was compelled to meet.

It is true that the letters written by Mr. Butchart to Aman Moore were in evidence, but there was nothing in these letters which Mr. Butchart was called upon to deny, and nothing in these letters which he was called upon to explain.

We have commented in the preceding paragraphs upon practically each and every letter introduced in this connection, and shown that there is not a single letter tending to establish guilt of these defendants.

It is the province of the court to construe instruments in writing, and not the province of the jury, and a rule of evidence well established, that where the writing is itself clear, no parol evidence can be given which would vary or contradict the clear language of the written instrument.

As we have shown, there is nothing in these letters that show that any meeting was ever held, or that anything was ever done by Mr. Butchart. He therefore could not be called upon to say anything about the "meeting in San Francisco" referred to in these letters.

Indeed the evidence conclusively shows that if there was any meeting in San Francisco between any of the parties of the accused, Mr. Butchart was not at any such meeting, and was not advised of anything which took place at such meeting. In other words, the evidence of the Government conclusively established that whatever took place at any meeting in San Francisco or elsewhere, if any such meeting was held, was not with the knowledge of Mr. Butchart, and he could not therefore be called upon to say or explain any evidence of such alleged meeting, and therefore no inference could be drawn against him because of his failure to say anything about such meeting, or to explain anything in regard thereto.

The indictment was defective and the demurrer should have been sustained, but failing in this the objection of these defendants to the introduction of any evidence in this cause upon the ground that the indictment did not state facts sufficient to constitute a crime was proper and such objection should have been sustained.

The testimony introduced with reference to the letter or complaint made to the Treasury Department, and the testimony with reference to the Interstate Bridge

rate matter, and the other testimony herein commented upon and to which objection was most strenuously urged at the trial, was improperly admitted, prejudiced the rights of these defendants and prevented them from having a fair trial as guaranteed by the Constitution and laws of our country, and therefore the conviction of each of defendants should be reversed.

The exclusion by the trial court of competent testimony offered by defendants to explain or qualify their actions in connection with testimony offered by the Government was improper and prevented a fair and impartial trial to defendants.

The errors committed by the trial court in its charge to the jury and in failing to give certain charges requested by defendants was grossly prejudicial to the rights of said defendants and prevented said defendants from having a fair trial.

Any one of the grounds above stated and commented upon are clearly sufficient to necessitate a reversal of the conviction of said defendants and it surely follows that when such numerous errors are committed as above pointed out and stated, that each of said defendants was prevented and denied a fair and impartial trial in accordance with the laws of this country and the proper rules of evidence, and therefore said defendants are entitled to a reversal.

Respectfully submitted,

TEAL, WINFREE, JOHNSON & MCCULLOCH,

Attorneys for Plaintiffs in Error.